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No. 92- 92-1934

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

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J.M., INDIVIDUALLY,
*Petitioner,*

- against -

V.C., [redacted],
*Respondent.*

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**PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF NEW JERSEY**

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## QUESTIONS PRESENTED

1. Whether this Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. _, 112 S.Ct. 2791 (1992), or other precedent prohibits the Supreme Court of New Jersey from applying New Jersey Constitutional protections, which extend rights to children prior to birth, to invalidate legislative enactments or executive actions which violate the constitutional rights of children at any age prior to birth?

2. Whether *Planned Parenthood v. Casey*, or other precedent of this Court, prohibits the New Jersey Courts from recognizing the natural father of a child as having requisite standing to prosecute the State and Federal Constitutional rights of his natural child at any time prior to birth (even after "viability")?

3. Whether, in light of the undisputed facts of human development, and the recently acquired scientific evidence of the humanity of the child prior to birth, the actions of the State of New Jersey, through its legislative enactments, executive actions and its courts, which result in the painful dismemberment and death of children prior to birth (even after "viability"), are violative of the natural and inalienable rights of those children and their rights acquired through the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution of the United States?

4. Whether it is violative of the natural and inalienable rights of a child or the child's natural father, or the rights of either of them acquired through the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution of the United States, for New Jersey to deny either access to court where they seek to litigate the rights of the child through an action prosecuted by the father (where the state fails to protect the child and acts to take the child's life)?

5. When does the life of a child begin?

6. Where a child asserts his or her right to live, does the child's rights, when balanced against a mother's Fourteenth Amendment liberty interest, require the state to protect the child's interest in life at any time from conception to birth under any particular circumstance?

## PARTIES TO THE PROCEEDINGS

Petitioner is J.M.,[1] the father of a child whose life he sought to protect through institution of this action, brought in his individual capacity, seeking injunction of an abortion and asserting his right to prosecute the rights of his child as guardian ad litem.

Respondent is V.C., the mother of the child who sought termination of the child's life. The other defendant, W.M.C., never appeared in the action.

[1] The New Jersey courts have ordered the protection of the identity of all parties and the case has proceeded under their initials.

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In The

*Supreme Court Of The United States*

OCTOBER TERM, 1992

No. 92-

J.M., individually
*Petitioner*

v.

V.C., *et al.*,
*Respondents*

**PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY**

Petitioner, J.M., in his individual capacity, respectfully prays that a Writ of *Certiorari* issue to review the judgment of the Supreme Court of New Jersey entered on March 11, 1993.

## ORDERS AND OPINIONS DELIVERED IN THE CASE

The Order of the Chancery Division of the Superior Court of New Jersey dated March 9, 1992 temporarily enjoining V.C. from aborting the child of V.C. and J.M. is found at A-137 to A-142. The Order of the Chancery Division, March 19, continuing the stay but dismissing J.M.'s Individual Complaint on the basis that he had "no standing" to prosecute the rights of his child is at A-171 to A-172. The Orders and opinion of the Appellate Division (two to one vote) dated March 23 dissolving the injunction, but staying it until review by the Supreme Court of New Jersey is at A-173 to A-176. The dissent of Hon. Thomas F. Shebell, J.A.D. is at A-177 to A-

179. The Orders of the Supreme Court of New Jersey, dated March 24, 1992, vacating the restraints are at A-180 to A-181.Upon J.M.'s direct appeal as of right to the Appellate Division, that Court entered an Order dated September 16, 1992 affirming the decision that J.M. had no standing to prosecute the rights of his child. A-188. On appeal as of right to the Supreme Court of New Jersey, that Court entered an Order dated December 8, over the objection of V.C., granting J.M. leave to file an overlength brief and preserving all state and federal constitutional issues [at A-221]. The Orders of the State Supreme Court dated March 9 granting J.M. leave to file overlength and supplemental briefs are at A-222 to A-223. The Final Order (and opinion) of the Supreme Court of New Jersey dated March 9, entered March 11, dismissing the appeal of J.M. on the grounds that *Planned Parenthood v. Casey*, 505 U.S. __, 112 S.Ct. 2791 (1992) controls the questions involved in J.M.'s standing to prosecute the rights of his child, is at A-224 to A-225.

## STATEMENT OF JURISDICTION

Petitioner seeks a Writ of Certiorari to review a Final Order of the Supreme Court of New Jersey entered on March 11, 1993. The Petitioner has claimed rights under the Constitution of the

United States, all the issues presented were raised below and the jurisdiction of this Court to review the judgment of the Supreme Court of New Jersey is invoked under 28 U.S.C.A. §1257(a).

## STATEMENT OF CONSTITUTIONAL PROVISIONS

This Petition involves the following constitutional provisions:

1. The Fourteenth Amendment Due Process Clause which states: "Nor shall any state deprive any person of life, liberty or property without due process of law." U.S.Const., amend. XIV, §1;

2. The Fourteenth Amendment Equal Protection Clause which states: "Nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, §1.

## STATEMENT OF THE CASE

The State of New Jersey authorizes the painful termination of the lives of children prior to birth, even after "viability". Under the New Jersey Constitution, the life of a child begins at conception and the child has a "natural and inalienable" right to live prior to birth. Yet, in this case the Supreme Court of New Jersey erroneously concluded it was precluded by *Planned Parenthood v. Casey*, 505 U.S. __, 112 S.Ct.2791 (1992), to recognize the right of a father to prosecute his child's rights. Further, the Court incorrectly concluded that *Casey* prohibited examination of questions under the Constitution of the United States which have not been determined directly by this Court: when does the life of a child begin, and if the child is a human being prior to birth, does the child possess rights?

This case addresses perhaps the worst governmental deprivation of individual human rights in the history of this nation. It

requires a determination of whether a state has the power to deny natural and inalienable rights from any class of individuals, whether J.M. has standing to prosecute the rights of his child and whether New Jersey's actions which resulted in the painful dismemberment and death of his child, prior to birth, are violative of the Constitution of the United States.

A. Statement of Facts

J.M., 38 years old, met V.C., 32, in July 1991. In September, petitioner first proposed marriage, which V.C. declined. On March 2, 1992, a physician confirmed that V.C. was eight weeks pregnant by (J.M.) (A-82 to A-92). J.M. again proposed marriage, but said he would discharge his obligations as father, whether or not they married or V.C. was able to assist rearing the child. On March 4, V.C. scheduled an abortion for March 11. (A-90 to A-91). After J.M. was unable to persuade V.C. to abandon her plans to terminate the life of the child, he instituted this action on March 9 (A-87 to A-88). J.M. was prepared to raise the child himself, but acknowledged that once the child was born, V.C. may change her mind and decide to be the primary custodian of the child. J.M. certified that he would not interfere with such wishes of V.C. (A-85).

Counsel for V.C. has represented that V.C. obtained an abortion terminating the child's life shortly after the New Jersey Supreme

Court Order of March 24, vacating the injunction. The child was 11 weeks old. In June of 1992, while this case continued in the courts, V.C. became pregnant by J.M. for the second time. When the new baby was ten weeks old gestation, V.C. told J.M. that she had scheduled another abortion (A-228). V.C., however, changed her mind explaining she was convinced that the child would experience pain and she was unable to subject her new baby to a painful death. However, she still believed that it is a mother's "right" to have an abortion and her position in the lawsuit was legally correct (A-228 to A-229).

Thereafter, V.C. told J.M. that she did not wish to communicate with him any longer. When the child was twenty weeks old (after conception) V.C. contacted J.M. to advise him that the baby was healthy, but she was having difficulties. The daily decision to reaffirm that the child would live weighed heavily upon her. V.C. did not want people to know she was pregnant because she did not want anyone to pressure her. V.C. refused to communicate with J.M. for periods of time. J.M. felt particularly helpless to protect this child because New Jersey had ruled that he had no "standing" to prosecute the rights of the child and New Jersey authorizes post-"viability" abortions (A-229 to A-231).

The record contains compelling testimony and extensive scientific and medical analysis concerning new knowledge of science, technology and medicine which supports three pertinent conclusions: (1) the life of a person begins at conception when the individual is a complete, separate human being; (2) the individual is complete even as to a unique identity at conception; and (3) there is new scientific evidence which demonstrates that the child experiences pain as early as eight weeks after conception (A-304 to A-358; A-270 to A-272).

B. Procedural History

J.M. instituted this action in the Superior Court of New Jersey on March 9, 1992 seeking to enjoin V.C. from terminating the life of their child (Complaint, A-72 to A-80). He brought the action on behalf of himself, asserting his right to defend the life of his child and his right to act as guardian ad litem (to prosecute his child's rights). The Chancery Court enjoined the abortion until a return date of March 30 (A-137 to A-142). On March 13, the Appellate Division directed the parties and the lower court to proceed using only the initials of the parties (A-143). On March 19 the Lower Court granted V.C.'s motion to dismiss the Complaint brought by J.M. individually, ruling that J.M. did not possess "standing" and

had no right to be guardian ad litem (and "prosecute" the child's rights). The Court alluded to J.M. as a "busy body" who has "no standing to prosecute this action." (A-146 to A-166; see Order dismissing J.M.'s claim individually, A-168 to A-169).

The Court continued the injunction because it did not dismiss the complaint of the child. J.M. filed a timely Notice of Appeal in the Appellate Division, which affirmed the Order of Dismissal of the Chancery Division on September 16 (A-185), while granting J.M.'s motion to supplement the record (A-186). Petitioner filed a timely Notice of Appeal in the New Jersey Supreme Court on November 4, 1992 (A-201 to A-211).[1] On November 18, 1992 J.M., individually, filed a motion with the New Jersey Supreme Court seeking leave to file an overlength brief of 144 pages and appendices containing legal and scientific authorities. V.C. vigorously opposed the motion, seeking to preclude much of J.M.'s legal argument. J.M.'s motion was granted by the Court on December

[1] Before that Notice of Appeal was filed by J.M., individually, the child's case had been completely litigated in all courts. Having proceeded separately, on March 24, 1992, when the injunction was vacated by the Supreme Court, a final Order was entered in the child's case (A-177 to A-178) (procedure in the child's case is at A-276 to A-281).

8 (A-218) authorizing the filing of the brief previously lodged with the Court. That brief, preserving all issues, is at A-239 to A-459.

V.C. moved to dismiss the appeal on the basis of *Planned Parenthood v. Casey, supra*. The Court granted J.M. leave to file overlength and supplemental briefs on the motion (A-219 to A-220), and dismissed the appeal on the grounds that *Casey* "governed" the case (A-221 to A-222). Dozens of organizations from this country and other nations were seeking leave to be heard in the case (see, e.g., A-223) and international figures were in the process of urging the Court to fully examine the issues.[2] It is clear that the New Jersey Supreme Court concluded the issues presented by this case could only be decided by this Court.

C. Justiciability

Although the child's life has been terminated, this case presents a justiciable controversy, because V.C. was pregnant at the time the complaint was filed. *Roe v. Wade*, 410 U.S. 113, 124-125 (1973). Pregnancy litigation provides a classic justification for a conclusion of non-mootness because it truly presents a situation that is "capable of repetition, yet evading review." *Roe*, 410 U.S.

[2] Mother Teresa of Calcutta executed a Certification to be submitted to the court. A copy of that Certification, unfiled because the New Jersey Supreme Court felt it was bound by *Casey*, is found at A-230 to A-233.

at 124. The plaintiff in *Roe* was not pregnant at the time of the trial in May of 1970, almost three years before the Supreme Court issued its opinion. *Roe*, 410 U.S. at 127. *Roe* observed:

> if...termination (of pregnancy) makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage and appellate review will be effectively denied. 410 U.S. at 125.

This rule applies here, or *Roe* itself could never be effectively reviewed.[3] V.C. has never contested this point in this case.

J.M. litigates the rights of the child, and his right to defend the child at all ages, from conception to birth. This Court has jurisdiction over issues relating to the entire nine months of pregnancy. The majority in *Roe* created very precise rules of law governing all stages of the child's development despite the fact that the pregnancy in *Roe* terminated only two months after the complaint was filed. The majority rejected the reasoning of the dissent that the Court should not review all nine months of the pregnancy because the mother was pregnant for only two months during the litigation. *Roe*, 410 U.S. at 171-172 (Rehnquist, C.J. dissenting). In addition, post-viability abortions were directly implicated in this case during the second pregnancy. Because of

[3] It is consistent with New Jersey law. *Matter of Conroy*, 464 A.2d 303, 306 (App.Div.1983), aff'd on this point, 486 A.2d 1209 (1985).a

the clear state action (see A-441 to A-452), the quality of the record, and the fact that this case directly presents questions never before decided by this Court, it is the best opportunity for this Court to decide the substantial questions it presents.

## REASONS FOR GRANTING THE WRIT OF CERTIORARI

In this case one parent acted in the best interest of his child while the other sought the child's painful dismemberment and death. The State of New Jersey acted to assist in the termination of the child's life. The Supreme Court of New Jersey ruled that it was powerless to protect the child's right to live, concluding: [1] it was irrelevant whether the child was a human being who experiences pain (A-177); and [2] it was precluded by *Casey* from recognizing a father's right to prosecute the rights of his child (A-221 to A-222). Both of these conclusions are wrong, resulting in the gravest deprivation of individual rights (before and after "viability"). This injustice is the product of the *Roe* Court's failure to directly decide the question of when the life of a human being begins, and whether, recognizing that a child is a human being prior to birth, these children have constitutional rights.

### I. RECENT SCIENTIFIC, MEDICAL AND TECHNOLOGICAL ADVANCES AND DISCOVERIES PROVIDE A LARGE BODY OF NEW FACTUAL DATA WHICH DEMONSTRATE THAT: (1) THE CHILD EXPERIENCES PAIN PRIOR TO BIRTH EVEN IN THE

VERY EARLY STAGES OF DEVELOPMENT AND (2) THE LIFE OF A HUMAN BEING BEGINS AT CONCEPTION. THERE IS A CONSENSUS WITHIN THE SCIENTIFIC AND MEDICAL COMMUNITIES CONCERNING THE BIOLOGICAL AND GENETIC FACTS WHICH SUPPORT THE CONCLUSION THAT THE LIFE OF A PERSON BEGINS AT CONCEPTION. THESE FACTS REQUIRE A REEXAMINATION OF THE LEGAL QUESTION OF WHETHER A CHILD HAS RIGHTS PRIOR TO BIRTH.

A. THE RELEVANCE OF THE FACTS AND NEW TECHNOLOGIES.

The legal conclusion that the child enjoys constitutional rights prior to birth and J.M. has standing to prosecute them rests upon the fact that the child's life begins prior to birth, and the child is a complete, separate and unique human being from conception, who experiences pain at early stages of development. The question of whether the child enjoys rights before birth but after viability is a state question essentially free of federal restraint. *Roe*, 410 U.S. at 164; *Casey*, 112 S.Ct. at 2804. Yet, New Jersey specifically authorizes medical procedures designed to terminate the life of a child at all times up to the moment of birth. This state action is in direct violation of both New Jersey and U.S. Constitutions (see A-358 to A-374).[4]

[4] In 1978 New Jersey repealed N.J.S.A. 2A:87-1 which made abortion a high misdemeanor, removing all prohibition against a mother seeking to take the life of her child. New Jersey licenses and regulates doctors and hospitals through its Board of Medical Examiners. New Jersey's Administrative Code states that only a physician licensed by the state may perform an abortion. Reg. of Bd. of Med. Exam. 13:35-42(b) (A-234 to A-238).

1. The Inability of the *Roe* Court to Reach a Conclusion on the Factual Component of the Inquiry Before it Lead to a Wholly Different Legal Analysis than that Required if the Court Found, as a Matter of Fact, that Life Begins at Conception or Prior to Birth.

The whole basis for the *Roe* decision was the premise that in 1973 it was not possible to determine when life began (so the child had no rights):

> (1) We need not resolve the difficult question of when life begins. ...the judiciary, *at this point in the development of man's knowledge*, is not in a position to speculate as to the answer" 410 U.S. at 159 (emphasis added); and [therefore] (2)...The word 'person', as used in the Fourteenth Amendment, does not include the unborn. 410 U.S. at 158.

*Roe* is the only case in which the United States Supreme Court reviewed that issue.[5] Significant recent developments and discoveries in science and medicine require a re-examination of Sections IX(A) and IX(B) of *Roe*, 410 U.S. at 156-162, which impliedly promised that the Court would do so when "man's knowledge" is sufficient. If the *Roe* Court had the benefit of man's

The Board specifically authorizes abortions any time prior to birth. Even between 20 weeks gestation and birth the only limitations placed upon an abortion is that the doctor must request from the State Board permission to perform a "D and E" procedure [always fatal to the child (s*See, Planned Par., Kansas City v. Ashcroft*, 462 U.S. 476, 483 (1983)] in a licensed ambulatory care facility. N.J.A.C. 13:35-4.2(g) (A-237). The physician, in order to obtain such permission, need only show he or she has the proper training. The state has created rules by which it literally licenses individuals to take the life of a child any time prior to actual birth (see A-441 to A-452).

[5] *Casey* reexamined *Roe* but did not review Sections IX(A) and IX(B) of *Roe* dealing with the question of the child's rights.

current knowledge it would have had to conclude that the life of a human being begins at conception, and a child is capable of experiencing pain as early as eight weeks gestation.[6] Because the *Roe* Court did not determine when the life of a child began, its legal analysis was very different from, and quite irrelevant to, the one the Court must do once it is found that the child is a human being prior to birth. Because of this inability, *Roe* ignored applicable principles of constitutional interpretation [see, IIA2 below].

The *Roe* Court found that it was "persuaded" that the word "person" "as used in the Fourteenth Amendment" did not include the "unborn." 410 U.S. at 158. To reach this conclusion *Roe* relied upon a review of those clauses in which the word "person" appeared. This approach is irrelevant when it is recognized that life begins at conception (or any time before birth). For one thing, it ignores the Equal Protection Clause. To determine the class of persons protected by the Due Process Clause the Court would have been required to construe that clause in *pari materia* with the Equal Protection Clause (both part of section one of the Fourteenth Amendment, ratified in 1868). The Equal Protection Clause forbids

[6] See IB below; A-304 to A-358; Appendix B at A-19 to A-30.

denial to "any person within its jurisdiction" the equal protection of the laws. If the word "person" as used in the Equal Protection Clause (and therefore the due process clause) could contain classes of "persons" so that the clause would apply to some but not to others, it would constitute an inherent contradiction rendering the Equal Protection Clause meaningless. Therefore, any construction of "person" in the Due Process Clause can only be conducted simultaneously with *Roe's* inquiry under Section IX(B), when the life of a human being begins (see, IIA2 below).

*Roe* also ignored prior precedent of the Court which found that a corporation was a "person" which enjoys liberty rights under the Fourteenth Amendment. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). *Grosjean* is relevant in three separate ways. First, a corporation no more meets the *Roe* test for a "person" than does a child prior to birth.[7] Second, *Grosjean* has precedential value on the issue of *stare decisis* to overrule *Roe*.[8] Third, *Grosjean* specifi-

[7] The difference was that the Court in *Grosjean* had to acknowledge the existence of a corporation, where the *Roe* Court said it could not determine the existence of the child. "Existence" becomes the most pertinent question. No theory of individual rights could justify inclusion of the legal fiction of a corporation as a "person" and deny the same right to any class of human beings.

[8] *Grosjean* construed the same word ("person") in the same Due Process Clause and overruled prior cases which excluded corporations as "persons" who enjoyed liberty interests. *See, Northwestern Life Insurance Co. v. Riggs*, 203 U.S. 243,

cally found that a corporation, although it was not a person under the citizenship clause contained in the first sentence of the amendment because it was not "born" or "naturalized", was a "person" which enjoyed rights under the Due Process Clause.[9]

2. The Question of the Child's Rights is the Sort of Mixed Question of Fact and Law Which, By Accepted Principles of *Stare Decisis*, Requires Overruling Prior Precedent When New Facts, or New Appreciation of Old Ones, Demonstrate that Prior Precedent Erroneously Applied Constitutional Principles.

*Stare decisis* is not a bar to the reexamination of *Roe* when new facts, or new appreciation of old ones, require it.[10] Of particular

355 (1907); *Western Turf Association v. Greenberg*, 204 U.S. 359, 363; *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). It is precedent which expanded the class of "persons" to whom the Due Process Clause applies.

[9] Obviously, construction of "person" in one clause is not necessarily relevant to another. Birth, therefore, is not a requirement of persons under the due process clause. *Roe* therefore creates a tragic contradiction: corporations, created by government, cannot be denied due process; individual human beings, owing nothing to government for their existence and for whose protection government was created, are denied the unalienable right to live. Once the child's humanity is determined, Roe's analysis is irrelvant [see IIA2-4 below].

[10] There are at least one hundred and seventy-four instances in which the United States Supreme Court has overruled, in whole or in part, its previous decisions. The present compilation of the 174 cases noted is based primarily upon the following authoritative sources: Justice Brandeis, dissenting in *Burnet v. Coronado Oil and Gas Co.*, 285 U.S. 393, 406-409 n1 (1932); *Annette E. Wilson, "Stare Decisis" Quo Vadis?*, 33 Geo. L.J. 251, 254 n. 17 (1945); William O. Douglas, "stare decisis," 49 Colum. L.Rev. 735-743, 756-758(1949); Albert R. Blaustein and Andrew H. Field, Overruling Opinions in the Supreme Court, 57 Mich. L.Rev. 151, 184-194(1958); The Constitution of the United States of America: Analysis and Interpretation, 1317-18, Lester S. Jayson, et al. ed. (1973). *Payne v. Tennessee* (Marshal, J., dissenting) 111 S.Ct. 2597, 2610, 2611 n.1 (1991). For the complete list of cases, see Appendix A at A-1 to A-18.

relevance is the often cited statement of Justice Brandeis[11] contained in his dissenting opinion in *Burnet v. Coronado Oil and Gas Co.*, 285 U.S. 393, 405-413:

> The reasons why this court should refuse to follow an earlier constitutional decision which it deems erroneous are particularly strong where the question presented is one of applying, as distinguished from what may accurately be called interpreting, the Constitution...The controversy is usually over the application to existing conditions of some well recognized constitutional limitation. This is strikingly true of cases under the due process clause when the question is whether a statute is unreasonable, arbitrary or capricious; of cases under the equal protection clause when a question is whether there is any reasonable basis for the classification made by a statute; .. In every such case the decision, in the first instance, is dependent upon the determination of what in legal parlance is called a fact, as distinguished from the declaration of a rule of law. When the underlying fact has been found, the legal result follows inevitably. The circumstances that the decision of that fact is made by a court instead of by a jury, should not be allowed to obscure its real character. 285 U.S. at 410-411.

Whether a child before birth is a person to whom the Fourteenth Amendment applies is a mixed question of fact and law, precisely the type of determination to which Justice Brandeis refers. In reaffirming that portion of *Roe* which found that the Due Process Clause of the Fourteenth Amendment "is broad enough to encompass a woman's decision whether or not to terminate her preg-

[11] The Brandeis opinion has been frequently cited with approval. See *Solario v. U.S.*, 483 U.S. 435, 450 (1987) (expressly overruling *O'Callahan v. Parker*, 395 U.S. 250 (1969); *United States v. Scott*, 437 U.S. 82, 101 (1978); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (Blackmun, J., dissenting).

nancy," the Court in *Casey* expressly declined to state that *Roe* was correctly decided either on constitutional principles[12] or moral grounds,[13] and articulated a reluctance to do so.[14] The Court, not being able to affirm either *Roe's* correctness or its morality, affirmed *Roe* based upon *stare decisis* and special considerations because of a divisive national debate. Whether the principles outlined in *Casey* operate as a bar to overturning the mother's rights found in *Roe*, they clearly are not a bar in the J.M. case on the question of the child's rights.[15]

[12] "We do not need to say whether each of us, had we been Members of the Court when the valuation of the State interest came before it as an original matter, would have concluded, as the *Roe* Court did, that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions. The matter is not before us in the first instance, and coming as it does after nearly twenty years of litigation in *Roe's* wake we are satisfied that the immediate question is not the soundness of *Roe's* resolution of the issue, but the precedental force that must be accorded to its holding." *Casey*, 505 U.S. , 112 S.Ct. at 2817.

[13] "Some of us as individuals find abortion offensive to our most basic principles of morality,..." *Casey*, 112 S.Ct. at 2806.

[14] *Casey*, 112 S.Ct. at 2812.

[15] Two critical distinctions made by Justice Brandeis apply here. First, where the Due Process Clause has been erroneously applied (as opposed to erroneously interpreted), overruling the prior decision is more easily justified. That principle has application here because the problem is not one of interpretation (clearly the Due Process Clause textually affirms the right to life of all persons), but rather one of applying a recognized right to specific circumstance. Secondly, Justice Brandeis distinguishes those legal questions which are by their nature mixed questions of fact and law. The legal question of whether the unborn child enjoys constitutional rights is such a question.

B. RECENT SCIENTIFIC, MEDICAL AND TECHNOLOGICAL ADVANCES AND DISCOVERIES PROVIDE A LARGE BODY OF NEW FACTUAL INFORMATION WHICH DEMONSTRATES THAT: (1) THE LIFE OF A HUMAN BEING BEGINS AT CONCEPTION AND (2) THE CHILD EXPERIENCES PAIN DURING ABORTIONS IN THE EARLY STAGES OF DEVELOPMENT. THERE IS A CONSENSUS WITHIN SCIENCE AND MEDICINE CONCERNING THE CRITICAL BIOLOGICAL AND GENETIC FACTS WHICH SUPPORT THE CONCLUSION THAT THE LIFE OF A PERSON BEGINS AT CONCEPTION.

1. The Exploding Revolution of Molecular Biology Has Changed Man's Knowledge of Developmental Neurology.

Biologically, human beings are made up of molecular building blocks. Their development is controlled by the genetic material DNA and RNA which contain instructions carried out by the synthesis and functioning of proteins. In 1973 most of our knowledge concerning human identity and development before birth was based upon gross morphological observations and biochemical studies on often heroic quantities of material. Since *Roe*, there have been many scientific, medical and technological advances and discoveries,[16] many in the last five years. The results point out

[16] Including: (1) Recombinant DNA Technology (allows the production of a large amount of specific pieces of DNA which assists in DNA probe research); (2) DNA Probe Technology (use of pieces of DNA that are radioactively labeled to find a piece of DNA or RNA that is related in sequence); (3) Southern Blot (combines the separation of molecules by electric charge and size with DNA probe technology); (4) Northern Blot (combines the separation of molecules by electric charge and size along with RNA probe technology for DNA); (5) DNA Mapping (process by which a map is made with guide posts of the DNA available in a particular sample (including chromosomes)); often accomplished by cutting the DNA molecule into pieces and then determining from where the pieces were derived); (6) DNA Finger

ignorance, errors of fact and judgment concerning the scientific

Printing (a procedure whereby DNA probes to minisatellite regions of human DNA are used to provide a complex Southern Blot pattern; provides a test for relatedness between samples of DNA; used with PCR such comparisons can be done on as little as one cell from each source; (7) Polymerase Chain Reaction (PCR) (a test-tube method of amplifying DNA sequences to billions of times invented in late 1984 used to obtain information from a single cell); (8) Monoclonal Anti-Body Technology (antibody preparation which contains only single type of antibody molecule); (9) Hybridona Technique (used to produce human specific antibodies; detects human proteins or peptides); (10) Flow Cytometry (cells in suspension, often marked with fluorescent monoclonal antibodies are intercepted by a beam of light; produces signals which drive a cell sorting apparatus which sorts and counts cells based upon a desired property - used to completely remap the nervous system and for prenatal diagnosis with fetal cells isolated from maternal blood); (11) Improved Ultrasound Technology (permits observation of the fetus at early ages of gestation); (12) DNA Methylation (modification of DNA so that it is recognized as different); (13) Fetal Heart Monitoring (observes the operation of the human heart of the fetus at early stages of development); (14) Advances in electroence photography which improve detection of signals of brain activity; (15) DNA cloning (application of DNA techniques to prenatal diagnosis of certain single gene disorders introduced in 1976; DNA-based tests first applied for prenatal diagnosis of alpha-Thalassemia, 1978, sickle cell anemia, 1978, beta-thalassemia, 1980, hemophilia A, 1985, hemophilia B, 1984, phenylketonuria, 1985, Duchenne and Becker muscular dystrophy, 1985, cystic fibrosis, 1986, and Huntington's disease, 1986. Boehm, C.D., et als., "Prenatal Diagnosis by DNA Analysis" In *The Unborn Patient* 2nd ed., edited by Michael R. Harrison et al., 82-91 at 82. Philadelphia: W.B. Saunders Company, (1991)); and (16) the use of restriction endonuclease enzymes Martinis, J.; et als., "Novel Applications of Monoclonal Antibodes." In *Basic Biology of New Development* In *Biotechnology In Basic Life Sciences* 25(1983): 129-154, at p. 129-130. Cole, S.C.P., et als., "Human Monoclonal Antibodies." *Mol Cell Biochem* 62 (1984): 109-120, at p. 109; Watson, J.D., et als., *Recombinant DNA: A Short Course*. San Francisco: W.H. Freman, 1983; Campbell, A.M. "Monoclonal Antibody Technology" In *Laboratory Techniques and Biochemistry and Molecular Biology*, edited by R.H. Burdon and P.H. Van Knippenberg. Eisevier (Amsterdam), 1985; Arnheim, N., et als., "Polymerase Chain Reaction." *Chemical & Engineering News* (Oct. 1990): 36-47, at p. 36. White, T.J., et als., "The Polymerase Chain Reaction." *Trends Genet* 5(1989): 185-189, at p. 185. Arnheim, N., et als., "Application of PCR: "Organismal and Population Biology." *Bioscience* 40(1990):174-182, at p. 174; Holding, C., et als., "Diagnosis of Beta-Thalassaemia by DNA Amplification in Single Blastomeres from Mouse Preimplantation Embryos." *Lancet* II (1989): 532-535. Handyside, A.H., et als., "Biopsy of Human Preimplantation Embryos and Sexing by DNA Amplification." *Lancet* I (1989):347-349. See, Appenidix at A-304 to A-358.

understanding of the child's existence as a unique human being, early development, ability to react to its environment and to feel pain prior to birth. These techniques permit scientists to observe human existence and development at a molecular level, applicable in determining genetic uniqueness, genetic diseases, sex and paternity through the analysis of human genes well in advance of gross anatomical observation.

2. The Life of Each Person Begins at Conception.

(a) Recent Developments in Science Support the Conclusion that the Life of a Human Being begins at Conception.

All of the genetic information and material necessary for the complete development of a unique human being is present at the moment human life begins at conception, when the head of the male sperm penetrates inside the female's ovum. The child is a complete human being for life from conception and the essence of the human being is complete.[17]

[17] See, A-310 to 314; A-96 to A-100; there is a consensus on the facts which form the basis for this conclusion. See authorities cited in Appendix B at A-19 following petition; see also, Moore, K.L., *Before We Are Born*, W.B. Saunders (1989) p.25, 26; Gilbert, S.F., *Developmental Biology*, Sinauer Ass. Inc., 1985, p.32-37, 58-63; Volpe, E.P., *Seeds of Life, In Biology and Human Concerns* (1983), Stout, J., 3rd Ed. Wm. C. Brown Co., p.18-20; Gilbert, S.F., *Developmental Biology*, Sinauer Ass. Inc., 1985, p.32-37, 58-63; Oppenheimer, S.B., et al. *Introduction to Embryonic Development*, 1989, Allyn and Bacon; Editorial Production Service, Lifland, et al. Bookmakers, p.20-60; Bernstein, R. et al. *Biology: The Study of Life* (1982), Harcorth, Brace, Jocvanovick, Inc. p. 584; Harlock E.B. Child Development 6th ed. McGraw-Hill, Inc. 1978 p. 53-54; Goin, O.B. *Man and the Natural World* 2nd ed. New York: Macmillan Publishing Co.,

Methylation of cytosine is a recent discovery which supports this conclusion. It's significance was unknown four or five years ago: DNA is even more sophisticated than previously suspected and its messages are written letter by letter, piece by piece. Everything to allow development of a particular human being exists at fertilization but is not read at the instant of conception. This discovery was neither expected nor predicted ten years ago. The female information acting in concert with the male information, provides the mechanism for the development of the parts of the physical anatomy.[18] This information and sophisticated directed mechanisms is contained in the first cell.[19] At each stage of development this methylation is erased and replaced and pro-

Inc., 1975 p. 183; Clark J. ed. *The Nervous System: Circuits of Communication In The Human Body*. Torstar Books, Inc., 1985, p. 99. Volpe, E.P. Biology and Human Concerns, 3rd ed. Wm. C. Brown Co. 1983, p. 20.

[18] LeJeune at A-101 to A-103. Chaillet, J.R., et als. "Parental-Specific Methylation of an Imprinted Transgene is Established During Gamestogenesis and Progressively Changes During Embryogenesis." *Cell* 66(1991): 77-83. Surani, M.A.H., et als., "Nuclear Transplantation in the Mouse: Heritable Differences Between Paternal Genomes after Activation of the Embryotic Genome." *Cell* 45(1986): 127-136. Swain, J.L., et als. "Parental Legacy Determines Methylation and Expression of a Cutosomal Transgene; A Molecular Mechanism for Paternal Imprinting." *Cell* 50(1987):719-727, at p. 719.

[19] It is absolutely required that in the first cell, there be both the DNA underlined by methylation in the male way and DNA methylation in the female way. The extraordinary observation is that this is the only cell in all of the life of a person in which those two methylation systems are present inside a cell unaltered.

gressively cells learn by a cascade of reaction to specialize so that some cells will develop to form the brain, another to make the liver, etc. It has been determined for instance, that the male way of "spelling" is obligatory for muscles, so that, even in the female, information from which muscles are built needs to be underlined in the male way. This understanding contradicts previous notions that fetal development occurs only through the mother. The child is programmed for life from conception.[20]

Approximately seven years ago Alec Jeffreys discovered and developed a technique which can determine the identity of a particular human being by using a region of a person's DNA to make a genetic "fingerprint." Much like a bar code in a store uniquely identifies a thing, this fingerprint uniquely identifies an individual and can be "read."[21] The Jeffreys technique has been

[20] LeJeune at A-101 to A-103. Chaillet, J.R., et als. "Parental-Specific Methylation of an Imprinted Transgene is Established During Gamestogenesis and Progressively Changes During Embryogenesis." *Cell* 66(1991): 77-83. Surani, M.A.H., et als., "Nuclear Transplantation in the Mouse: Heritable Differences Between Paternal Genomes after Activation of the Embryotic Genome." *Cell* 45(1986): 127-136. Swain, J.L., et als., "Parental Legacy Determines Methylation and Expression of a Cutosomal Transgene; A Molecular Mechanism for Paternal Imprinting." *Cell* 50(1987):719-727, at p. 719.

[21] LeJeune at A-101 to A-102; Jeffreys, et al. ***DNA Fingerprints and Segregation Analysis of Multiple Markers in Human Pedigrees***, Am. Jour. of Hum. Gen., 39:11-24 (1986); Honma, M., et al. ***Application of DNA Fingerprinting to Parentage and Extended Family Relationship Testing***, Human heredity, 1990, 40:p356-362; Jeffreys, A.J., et al., ***Principles and Recent Advances of Human***

applied to determine if two samples containing genetic material (DNA) are from the same person.[22] The field of DNA fingerprinting as applied in court cases is the direct result of this technology.[23] The techniques of fetal cell intrusion, prenatal diagnosis of disease, villus sampling, in vitro fertilization, and sexing of preimplanted embryos also establish the existence of a unique human being early in gestation.[24] Using modern molecular biology technology, it has been found that by the third cell division

*DNA Fingerprinting*; DNA Fingerprinting: Approaches and Applications, (1991).

[22] Jeffreys, A.J., et als., "Positive Identification of an Immigration Test-Case Using Human DNA Fingerprints." *Nature* 317 (1985):818-819, at pp. 818-819.

[23] Honma, M.; and Ishiyama, I. "Application of DNA Fingerprinting to Parentage and Extended Family Relationship Testing." *Hum Hered* 40(1990): 356-362, at p. 356. The technique has been successful in establishing paternity of the developing child at 9 weeks gestation, with a certainty of 360 trillion to one. Kovacs, B.W., et als., "Prenatal Determinations of Paternity by Molecular Genetic "Fingerprinting." *Obstet Gynecol* 75(1990): 474-478, at pp. 474-475. The procedure established the existence of a unique human being at the time of the tests.

[24] Price, J.O., et als. "Prenatal Diagnosis with Fetal Cells Isolated From Maternal Blood by Multiparameter Flow Cymetry" *Am J Obstet Gynecol* 165(1990): 1731-1737, at p. 1731; Oppenheimer, S.B.; and Lefeure, G. Jr. *Introduction to Embryonic Development* Allyn and Bacon 1989. (pp. 20-60) at p. 53. Papalia, D.E., et als., *A Child's World: Infancy Through Adolescence*. New York: McGraw-Hill, Inc., 1979, at p. 51; Hogge, W. A. "Chorionic Villus Sampling" In *The Unborn Patient* 2nd ed. edited by M.R. Harrison et al., 53-57. Philadelphia: W.B. Saunders Co., 1991, at p. 53; Boehm, C.D. and Kazazian, H.H. Jr., "Prenatal Diagnosis by DNA Analysis" In *The Unborn Patient* 2nd ed., Harrison et al., 82-91 at 82. Philadelphia: W.B. Saunders Company, (1991); Handyside, A.H., et als. 1989 "Biopsy of Human Preimplantation Embryos and Sexing by DNA Amplification." *Lancet* I (1989):347-349, at p. 348; Monk, M.; and Holding, C. "Amplification of a Beta-Haemoglobin Sequence in Individual Human Oocytes and Polar Bodies." *Lancet* 335(1990): 885-987, at 985.[24]

after fertilization control of growth and development has been established by the new human's DNA.[25]

(b) There is a Consensus within the Scientific and Medical Communities Concerning the Biological Facts which Support the Conclusion that Life begins at Conception.

Respondent relies upon an affidavit of one Michael V.L. Bennett to support her contention that there is no consensus that life begins at conception (A-190 to A-198). The affidavit relies upon testimony of Dr. Leon Rosenberg given in 1981 before the Subcommittee on Separation of Powers of the Judiciary Committee of the U.S. Senate (Human Life Bill, S. 158, 97th Cong., 1st Sess.) (A-191 to A-192). The subcommittee, however, before whom Dr. Rosenberg testified, published a report which specifically found, as a matter of scientific fact, that human life begins at conception:

> The testimony of these witnesses and the voluminous submissions received by the subcommittee demonstrate that contemporary scientific evidence points to a clear conclusion: life of a human being begins at conception...today the facts are beyond dispute.Physicians, biologists, and other scientists agree that conception marks the beginning of the life of a human being ... there is overwhelming agreement on this point in countless medical, biological, and scientific writings. *Report on Human Life Bill*, Subcommittee on Separation of Powers, Committee on the Judiciary United States Senate (97th Cong., 1st Sess. 1981) p. 7.

[25] Telford, N.A.; Watson, A.J.; and Schultz, G.A. "Transition From Maternal to Embryonic Control in Early Manmalian Development: A Comparison of Several Species." Molecular Reproduction and Development 26(1990): 90-100, at 92.

Further, the report singled out Dr. Rosenberg for comment:

> It may at first seem difficult to reconcile how the existence of such a broad consensus with the testimony of some witnesses opposing S-158 ... who emphatically denied that it is possible to determine when a human life begins. If the facts are so clear, it is crucial to understand how, for example, one like (Dr. Leon Rosenberg) could say that he knows of no scientific evidence that shows when actual human life exists. ...Such statements appear on the surface to present a direct contradiction to the biological evidence discussed above. The explanation of this apparent contradiction lies in existence of the two distinct questions..., the scientific question and the value question. We must consider not only whether unborn children are human beings, but also whether to accord their lives intrinsic worth and value equal to those of other human beings. ...It is a scientific question whether an unborn child is a human being, in the sense of a living member of the human species. It is a value question whether the life of an unborn child has intrinsic worth and equal value with other human beings. ...Those witnesses who testified that science cannot say whether unborn children are human beings were speaking in every instance to the value question rather than the scientific question. No witness raised any evidence to refute the biological fact that from the moment of human conception there exists a distinct individual being who is alive and is of the human species. No witness challenged the scientific consensus that unborn children are 'human beings', insofar as the term is used to mean living beings of the human species. Report on Human Life Bill, *supra*, at 10, 11.

The Subcommittee found Dr. Rosenberg adopted an untruthful approach by claiming that whether the child is a person is a matter of definition, not a question of fact, and "person" can be defined any way one wishes. Only by disregarding the facts could Dr. Rosenberg state that he "knows of no scientific evidence showing

when actual human life exists," and "he was speaking only to the value questions ..." Report, *supra* at 11, 12.[26]

3. The Child Can Experience Pain as Early as Eight Weeks After Conception.

Dr. Bernard Nathanson testified that in his opinion the child experiences excruciating pain during abortion. A vivid description which he claims supports this conclusion is found in a film of an actual abortion made in 1984. The baby is seen moving away from the suction apparatus and then the arms and legs of the child are torn off. The mouth of the baby is open, the child is grimacing and evidencing pain. (see A-126 to A-128). Recent discoveries now provide scientific evidence of this contention. With the use of monoclonal antibody technology[27], and electrophysiologoy scientists could investigate nervous system function and development at the molecular level. We now know that the classical histological and functional criteria for defining (nerve) cell types was

[26] The petitioner is unable to find a single modern reference in the scientific literature which refutes the statement that humans are genetically distinct and complete from their parents at the moment of conception. The scientific literature is replete with clear statements that human life begins at conception. Petitioner compiled a partial list of quotations from scientific and medical journals that make the clear statement that life begins at conception."Appendix B," at A-19 to A-30.

[27] Campbell, A.M. "Monoclonal Antibody Technology" In *Laboratory Techniques and Biochemistry and Molecular Biology*, edited by R.H. Burdon and P.H. Van Knippenberg. Eisevier (Amsterdam), 1985

oversimplified.[28] One outstanding discovery, first described in 1985,[29] was the detection of some 30 neuropeptides (or nerve hormones) directly involved in the functioning nervous system of the human body. Neuropeptides function as neurotransmitters and neuromodulators which are located at axon terminals at synapses throughout human tissue. Two of them are of particular relevance are substance P (the chemical messenger of pain) and enkephalin (a neurotransmitter involved in pain perception).[30] The detection of these two neuropeptides in samples of human tissue has been used to define and locate nervous system development and function in the human being. The results point to a complex process of interacting peptides, neurons, and ion channels which play an important role in the detection and transmission of sensation in the human.

[28] Fischbach, G.D. "An Introduction to Molecular Approaches in Studies of Neuronal Development and Synapse Formation." In *Molecular Neurobiology* In *Neurology and Psychiatry*, edited by M.D. Erich, R. Kandel. New York: Raven Press, 1987.

[29] Ballesta, J.; Bloom, S.R.; and Polak, J.M. "Distribution and Localization of Regulatory Peptides." *Crit Rev Clin Lab Sci* 22(1985):185-218, at pp. 185-186.

[30] Clark, J., ed. *The Nervous System: Circuits of Communication. The Human Body*. Torstar Books, Inc., 1985, at pp. 152-154.

Since *Roe* a number of generally accepted assumptions about human neurological development and ability to feel pain have been refuted. The first assumption was that neonates were incapable of feeling pain.[31] The second, that myelinated nerve fibers were necessary for pain perception (and they did not form completely until after birth). The third, that pain experience required pain detecting nerves connected to the thalamus and then to the brain cortex (and a period of cortical maturation). These assumptions were based upon gross histological observations, with no knowledge of neuropeptides, or the methodologies and techniques developed in the last decade. Only in the last decade has the concept that even normal neonates cannot feel pain been challenged,[32] and the assumption that a fully developed and mature cortical brain region was necessary for pain perception was inconsistent with the observations of care givers for premature infants.[33]

[31] Porter, F. "Pain in a Newborn," *Neonatal Neurology, Clinics in Neonatology*, 16(2) p. 549 et seq. (1989).

[32] Fitzgerald, M.; and McIntosh, N. "Pain and Analgesia in the Newborn." *Arch Dis Child* 64(1989): 441-443, at p. 441.

[33] Fletcher, A.B. "Pain in the Neonate." *N Eng J Med* 317(1987): 1347-1348, at p. 1347. Biochemical studies supported the observations of care givers concerning pain experiences. Detailed hormonal studies in preterm neonates undergoing surgery under minimal anesthesia have shown marked release of catecholamines, as well as autonomic nervous stimulation, heart rate changes,

Based upon new studies standard medical practice changed:

> Any decision to withhold anesthetic agents ought not to be based on the infant's age or *perceived degree of cortical maturity*; it should be based upon the same criteria used in older patients."[34] (Emphasis added).

With operative procedures being performed on premature babies as early as four months, it is a standard medical practice to anesthetize the child (at any age).[35] Anesthesia is used during fetal surgery as early as 18 weeks gestation.[36]

increased hormonal activity and increased motor activity. These are associated with experiences of pain. Rosen, M.A., *Anesthesia for Procedures Involving the Fetus* (1991), Seminars in Perinatology 15:410-417. It has been documented that endocrine and metabolic responses associated with pain are abolished by giving anesthesia to preterm neonates Scanlon, J.W.; "Appreciating Neonatal Pain." *Adv Pediatr* 38(1991): 317-333, at p. 320. Rosen, M.A. "Anesthesia for Procedures Involving the Fetus." *Semin Perinatol* 15(1991): 410-417, at p. 431), and to the fetus Levine, A.H. (1991), Fetal Surgery, *Aorn J*, V54(1): 16-19, 22-27, 30-32, at p. 27. Rosen, M. "Anesthesia and Monitoring for Fetal Intervention" In *The Unborn Patient* 2nd ed., (1991), Harrison (editors), W.B. Saunders Co. p. 176, at p. 176).

[34] Fletcher, A.B. "Pain in the Neonate." *N Eng J Med* 317(1987): 1347-1348, at p. 1348.

[35] See Porter, F., *Pain in a Newborn*, Neonatal Neurology, Clinics in Neonatology, 16(2) p.549 et seq. 1989. For general discussion of current medical practice for pain relief for neonates see: Choonara, I, *Management of Pian in Newborn Infants*, in Seminars on Peranotology, 16(i):32-40 (1992); Malhortora, N., L. Han, *Privilege of Analgesia in the Neonate*, in Seminars in Perinatology, 15(5):418-422 (1991).

[36] Levine, A.H. "Fetal Surgery." *Aorn*, 54(1991): 17-19, 22-27, 30-32, at p. 27-30; Harrison, M.R., et als., "Correction of Congenital Diaphragmatic Hernia In Utero, V. Initial Clinical Experience." J Pediatric Surg 25(1990):47-57, at p. 49; Strickland, R.A., et als., "Anesthesia, Cardiopulmonary Bypass, and the Pregnant Patient." *Mayo Clin Proc* 66(1991): 411-429, at p. 411-415. Harrison, M.R., et als., "Successful Repair in Utero of a Fetal Diaphragmatic Hernia After Removal of Herniated Viscera from the Left Thorax." *N Eng J Med* 322(1990): 1582-

Until recently pain perception was presumed to require myelinated nerve fibers[37]. This is not the case even in adults.[38] Unmyelinated nerve fibers transmit pain.[39] Most fibers of the nervous system are not myelinated until two years after birth.[40] The classical view of the nervous system as a hard wired system projecting from nociceptors (pain detecting nerves) to the thalamus and then to the cortex cannot explain all pain experiences.[41]

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1584, at p. 1582. Longuker, M.T., et als., "Maternal Outcome After Open Fetal Surgery." *JAMA* 265(1991): 737-741, at p. 737. Harrison, M.R., et als., "Fetal Hydronephrosis: Selection and Surgical Repair." *J Pediatr Surg* 22(1987): 556-558, at p. 556. Rosen, M. "Anesthesia and Monitoring for Fetal Intervention" In *The Unborn Patient* 2nd ed., edited by M.R. Harrison 172-181. Philadelphia: W.B. Saunders Co., 1991, at p. 176; Strickland, supra, at 411; Rosen, M. "Anesthesia and Monitoring for Fetal Intervention" In *The Unborn Patient* 2nd ed., edited by M.R. Harrison 172-181. Philadelphia: W.B. Saunders Co., 1991, at p. 176;

[37] Clark, J., ed. *The Nervous System: Circuits of Communication. The Human Body*. Torstar Books, Inc., 1985, at p. 153.

[38] Anand, K.J.S.; and Hickey, P.R. "Pain and Its Effects in the Human Neonate and Fetus." *N Engl J Med* 317(1987): 1321-1329, at p. 1322. Casey, K.L. "Neural Mechanisms of Pain: An Overview." *Acta Anaesthesiol Scand* Suppl 74(1982): 13-20, at 13.

[39] Anand, K.J.S.; and Hickey, P.R. Id; Clark, J., ed. *The Nervous System: Circuits of Communication. The Human Body*. Torstar, 1985, p. 109; Scanlon, J.W.; "Appreciating Neonatal Pain." *Adv Pediatr* 38(1991): 317-333, 320.

[40] Clark, J., ed. "The Nervous System: Circuits of Communication." *The Human Body*. Torstar Books, Inc. (1985).

[41] Wall, P.D. "The Biological Function and Dysfunction of Different Pain Mechanisms." In *Advances in Pain Research and Therapy*. Edited by F. Sicuteri, (10:19-28). New York: Raven Press, 1992, at p. 19.

*Science now questions* the assumption that cortical involvement is necessary for pain detection.[42] Evidence supporting the conclusion that pain can be experienced before 23 weeks gestation includes the early detection of pain associated chemicals; the timing of nerve development; the observation of fetal behavior and the characterization of full term infants with anencephaly.

The presence of substance P is a leading indicator of an organ system's ability to detect and transmit pain.[43] The involvement of neuropeptides in pain transmission was not known when science originally theorized a sensory cortex was needed for pain perception. It is a pain transmitter and a neuromodulator in the primary cortical areas of sensorial integration,[44] and was found in neuronal elements of the human cortex at eighteen weeks gesta-

[42] Boreus, L.O. "Pain in the Newborn - Pharmacodynamic Aspects. *Dev. Pharmocol Ther* 15(1990): 142-148, at p. 144. Lagercrantz, H.; and Forssberg, H. "Functional Development of the Brain in the Fetus and Infant. *Lakartidningen* 88(1991) 1880-1885.

[43] "The importance of the early appearance of enkephalin and substance "P" neurons and fibers of the pain pathways in the major subnuclei connecting with the cardiovascular, gastrointestinal and respiratory functions in the human has to be stressed." Yew, D.T., et. al. ***Development and Localization of Enkephalin and Substance P in the Nucleus of the Tractus Solitarius in the Medulla Oblongata of Human Fetuses***, Neuroscience 34(1990) p.491-498, at p. 491.

[44] Manolidis, L.; Baloyannis, S.; and Mandolidis, S. "Substance P in the Acoustic Area of the Cortex During Neuronal Development and Maturation." *Acta Otolaryngol* (stockh) 107(1989: 375-382, at p. 375.

tion (the earliest time point tested).[45] Substance "P" positive neurons and nerve fibers have been detected at eleven weeks and enkephalin positive neurons and nerve fibers at thirteen weeks gestation.[46] Substance "P" has been found as early as five weeks gestation and all stages of development thereafter.[47]

The morphological substrate (the necessary pieces) for nociception (pain detection) in the spinal cord exists at very early developmental stages.[48] At twelve weeks gestation the thalamus, third ventricle, midbrain, brain stem, and cerebellar hemispheres are developed and their appearance, besides physical size, will go

[45] Manolidis, L., Id.

[46] Yew, D.T., et. al. *Development and Localization of Enkephalin and Substance P in the Nucleus of the Tractus Solitarius in the Medulla Oblongata of Human Fetuses*, Neuroscience 34(1990) p.491-498, at p. 491.

[47] Tam, P.K.; and Lister, J. "Maldevelopment of Spinal Cord - Substance P in Spina Bifida." *Z Kinderchir* 41(1986): 206-208. Wadhwa, S., et als., "Substance P-Immunoreactivity in the Developing Human Retinogeniculate Pathway." *Neurosci Lett* 89(1988): 25-30, at p. 25. Paulin, C., et als., "Ontogeny of Substance P in the Digestive Tract, Spinal Cord and Hypothalamus of the Human Fetus." *Regul Pept* 14(1986): 145-153, at p. 145.; Uddman, R., et als., "Peptide-Containing Nerve Fibers in Human Extracranial Tissue: A Morphological Basis for Neuropeptide Involvement in Extracranial Pain?" *Pain* 27(1986): 391-399; Luo, C.B., et als., "Localization of Substance P and Enkephalin by Immuno histochemistry in the Spinal Cord of the Human Fetus." *Neuroscience* 27(1988): 989-993, at p. 989.

[48] Rizvi, T.; Wadhwa, S.; and Bijiani, V. "Development of Spinal Substrate for Nociception" *Pain 4(1987-suppl.): S195.*

unchanged throughout the rest of fetal development.[49] At seven weeks cutaneous sensory receptors appear, preceded by the development of synapses or junctions between sensory nerve fibers and interneurons of the spinal cord:[50]

> neuronal multiplication occurs mainly from the tenth to twentieth gestational weeks, after which no new nerve cells are formed, though neuronal arborization and the information and reorganization of synapses continues until adulthood...Somatosensory functions are developed at an early stage. The pain threshold is assumed to be lower in the fetus than in the adult. In man general fetal movements appear from the eighth gestational week and more complex movements such as sucking, swallowing and breathing during the tenth to twelfth gestational weeks. These movements are generated by neuronal networks.[51]

Movement by the fetus away from outside stimulation,[52] and brain activity,[53] have been observed by the eighth week. Nature prepares the nervous system first so that all other systems can

[49] Filly, R.A. "Sonographic Anatomy of the Noraml Fetus" In *The Unborn Patient* 2nd ed., ed. Harrison et al., 92-130, Phila.: W.B. Saunders Co., 1991, at 122.

[50] Anand, K.J.S.; and Hickey, P.R. "Pain and Its Effects in the Human Neonate and Fetus." *N Engl J Med* 317(1987): 1321-1329, at p. 1322.

[51] Lagercrantz, H., et als. "Functional Development of the Brain in the Fetus and the Infant." *Lakartidningen* 88(1991): 1880-1885.

[52] Flower, M.J. "Neuromaturation of the Human Fetus." *J Med Philos* 10(1988): 237-351.

[53] Goldenring, J.M. "Development of the Fetal Brain." *N Engl J Med* 307(1982): 564, at p. 564; Flower, M.J., *supra*.

develop and function properly.[54] A basic sensory response loop is clearly present shortly after eight weeks gestation.

It was recently discovered that many behaviors characteristic of newborns are clearly present in children with anencephaly[55] (children born without a developed cortex).[56] Previously, these behaviors had erroneously been ascribed to cerebral hemispheric activity.[57] After birth they live a few hours to a few months.[58] After birth these children breath spontaneously, have a grasp response,[59] and respond to noxious stimuli known to cause pain by avoidance, by withdrawal and by crying.[60] They breath,

[54] Kalvger, G.; and Kalvger, M.F. Human Development: *The Span of Life.* St. Louis: The C.V. Mosby Company, 1974, at p. 35.

[55] The Medical Task Force on Anencephaly, (Stumpf, D.A., et al.) "The Infant with Anencephaly" *N Eng J Med* 322(1990): 669-674.

[56] Shewmon, D.A., et als., "The Use of Anencephalic Infants as Organ Sources: A Critique." *JAMA* 261(1989): 1773-1781.

[57] The Medical Task Force on Anencephaly, supra.

[58] Stumpf, D.A., Chair of Medical Task Force on Anencephaly "The Infant With Anencephaly." *N Eng J Med* 322(1990): 669-674.

[59] Ashwal, S., et als., "Anencephaly: Clinical Determination of Brian Death and Neuropathologic Studies." *Pediatr Neurol* 6(1990): 233-239.

[60] Stumpf, D.A., Chair of Medical Task Force on Anencephaly. "The Infant With Anencephaly." *N Eng J Med* 322(1990): 669-674. Shewman, D.A., et als., "The Use of Anencephalic Infants as Organ Sources: A Critique." *JAMA* 261(1989): 1773-1781. Van Assche, F.A. "Anencephalics as Organ Donors." *Am J Obstet Gynecol* 163(1990): 599-600. Ashwal, S., et als., "Anencephaly: Clinical Determination of Brain Death and Neuropathologic Studies." *Pediatr Neurol* 6(1990):

cough, hiccup, smile, grimace, yawn and suck. In a recent study of twelve anencephalic infants, all twelve responded to pain, had an exaggerated sustained response to touch, evidenced spontaneous movement, and breathed spontaneously.[61] Seven of the twelve responded to a stimulation at their mouth towards the stimulus and a sucking response.[62] Spontaneous movement in the child begins between six and seven and one-half weeks gestation.[63] Stimulation of the mouth area resulting in a response towards the stimulus is seen in the child at 9 weeks gestation and sucking 11 weeks.[64] The child 6 to 11 weeks gestation is neurologically developed at least equivalent to the twelve anencephalic children described above. They are capable of experiencing pain.

II. THE COURT SHOULD GRANT THE WRIT AND DETERMINE ISSUES NEVER DIRECTLY DETERMINED BY THIS COURT: [1] DO ALL HUMAN BEINGS ENJOY A RIGHT TO LIVE PRIOR TO BIRTH; AND [2] DOES A CHILD'S INTEREST IN LIFE, PRIOR

233-239.

[61] Ashwal, supra.

[62] *Id.*

[63] de Vries, J.I.P.; Visser, G.H.A.; and Prechtl, H.F.R. "The Emergence of Fetal Behavior. I. Qualitative Aspects." *Early Hum Dev* 7(1982): 301-322. Flower, M.J. "Neomaturation of the Human Fetus." *J Med & Phil* 10(1985): 237-251.

[64] Flower, M.J. "Neomaturation of the Human Fetus." *J Med & Phil* 10(1985): 237-251.

TO BIRTH, OUTWEIGH THOSE OF THE MOTHER, UNDER ANY PARTICULAR SET OF CIRCUMSTANCES.

A. THE CHILD HAS CONSTITUTIONAL RIGHTS PRIOR TO BIRTH.

1. The Weight of the Legal Authorities Conclude that the Life of a Child Begins at Conception.

The weight of legal authority supports the conclusion that the child is a human being prior to birth. New Jersey recognizes that a child's life begins at conception. See, *Smith v. Brennan*, 157 A.2d 497, 504-505 (1960); *Hummel v. Reiss*, 608 A.2d 1341, 1345-1346 (1992); *Gleitman v. Cosgrove*, 227 A.2d 689 (1967);(A-358 to A-359; A-367 to A-370). The thirty-six other states which have addressed this issue have found that the life of a child begins at conception or shortly thereafter.[65]

[65] See authorities and quotations from each jurisdiction. Appendix C at A-31 to A-57. In addition, in 1978 the Organization of American States made effective its Declaration of Human Rights, which states: "Every person has the right to have his life respected. This right shall be protected by law, and, in general, from the moment of conception. No one should be arbitrarily deprived of his life." Chapter II, Art. 4, §1. Signed by: Argentina, Barbados, Bolivia, Colombia, Costa Rica, Dominican Republic, Ecquador, El Salvador, Grevado, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Peru, Uruguay, and Venezuela. A careful review of 18th Century Authorities reveals that the early British Common Law recognized rights in the child from the earliest moments that science could then verify the child's existence. See Appendix D at A-58 to A-71.

"Viability" is an arbitrary age of the child that has no relevance of a factual, moral or legal nature.[66] In *Smith v. Brennan*, 157 A.2d 497 (1960), the New Jersey Supreme Court stated:

> The most important consideration, however, is that the viability distinction has no relevance to the injustice of denying recovery for harm which can be proved to have resulted from the wrongful act of another. Whether viable or not at the time of inquiry, the child sustains the same harm after birth; therefore, should be given the same opportunity for redress. 157 A.2d at 504.

The irrelevance of the child's dependence was eloquently expressed in *Kelly v. Gregory*, 125 N.Y.S. 2d 696, 697 (1953):

> The mother's biological contribution from conception on is nourishment and protection; but the foetus has become a separate organism and remains so throughout its life. That it may not live if its protection and nourishment are cut off earlier than the viable stage of its development is not to destroy its separability; it is rather to describe conditions under which life will not continue. Succeeding conditions, exist, of course, that have that result at every stage of its life, post-natal as well as prenatal. Id. at 697.

[66] In retrospect, the "viability" distinction is little other than a preferred avoidance of the messy and unpleasant fact that some children will survive abortion after viability, perhaps maimed, despite the best efforts to terminate their lives. It is a rationalization for society to assist in terminating the life of the human being, but only if we need not witness the aftermath. See, *Abele v. Markle*, 351 F.Supp. 224, 232 (D.C. Conn. 1972), which some have suggested was the inspiration for *Roe v. Wade*, not only on "viability" but the suggestion that the law should avoid addressing the obvious humanity of the child [Id. at 231].

Most of the states which addressed the question have found that viability has no factual or legal relevance.[67] It is as unjust to subject a child to a painful death before "viability" as it is after.

2. The Right of a Person to Live Depends Only Upon the Existence of the Individual Human Being.

The child's interest in life from the moment of being is the basis for a right to live because (1) government has no power to deny the natural and inalienable right to life from any class of human beings and (2) the class of persons protected by the Fourteenth Amendment is coextensive with all humanity.

(a)

[67] *Wolfe v. Isbell*, 280 So.2d 758, 761 (1973) (Ala.); *Simon v. Mullin*, 380 A.2d 1353 (1977) (Conn.); *Greater Southeast Community Hosp. v. Williams*, 484 A.2d 394, 396 (D.C. Ct. App. 1984); *Day v. Nationwide Mut. Ins. Co.*, 328 So.2d 560, 561 (1976) (Fla.); *Renslow v. Mennonite Hospital*, 367 N.E. 2d 1250, 1252-53 (1977) (Ill.); *Cheaney v. State*, 285 N.E.2d 265, 268 (1972) (Ind.); *Cowe v. Forum Group, Inc.*, 541 N.E.2d 962, 967-68 (Ind.App. 1989); *Johnson v. Southern New Orleans Light and Traction Co.*, Docket 9048 (La. App. Orl. Dec. 10, 1923); *Valence v. La. Power & Light Co.*, 50 So.2d 847 (La. App. 1951); *Smith v. State*, 33 Me. 48, 57 (1851); *Group Health Ass'n v. Blumenthal*, 453 A.2d 1198, 1206 (1983) (Md.); *Torigan v. Watertown News Co., Inc.*, 225 N.E.2d 926, 927 (1967) (Mass.); *Womack v. Buchhorn*, 187 N.W.2d 218 (1971) (Mich.); *Steggall v. Morris*, 358 S.W.2d 577, 579-81 (1953) (Mo.); *N.D. Cen. Code*, secs. 12.1-17.02 through 12.1-17.1.06 (Supp. 1991); *Hopkins v. McBane*, 359 N.W.2d 862, 865 (N.D.); *Williams v. Marion Rapid Transit*, 87 N.E.2d 334, 340 (1949) (Ohio); *Steinberg v. Brown*, 321 F.Supp. 741, 746 (N.D. Ohio 1970); *Evans v. Olson*, 550 P.2d 924, 925 (1976) (Okla.); *Amadio v. Levin*, 501 A.2d 1085, 1087 (1985) (Pa.); *Sinkler v. Kneale*, 164 A.2d 93, 96 (1960) (Pa.); Sylvia v. Gobeille, 220 A.2d, 222, 223-24 (1966) (R.I.); *Kalafut v. Gruver*, 389 S.E.2d 681, 683-84 (1990) (Va.); and *Puhl v. Milwaukee Auto Ins. Co*, 99 N.W.2d 163, 170 (1959) (Wis.).

The right to life, the most basic of all human rights, is not derived from government but from an individual's existence, and the interest that each person has in life. The essence of the right itself prohibits denial by classification. The Declaration of Independence states that man's 'unalienable' right to life is a 'self-evident truth', and that the very purpose of our government is to protect the natural rights of people. This understanding (that the right to live is derived from nature and government has the power to limit the class of those who enjoy the right) was shared by both the framers of the Fourteenth Amendment and the Founding Fathers.[68]

Representative John A. Bingham, author of section one of the Fourteenth Amendment stated:

> [T]he Constitution of the United States...declared that "no person shall be deprived of life, liberty, or property without due process of law." By the great law of ours it is not inquired whether a man is "free" by the laws of England; it is only to be inquired *is he a man*, and therefore free by the law of that

[68] Representative Thaddeus Stevens, on the date the Thirteenth Amendment was declared ratified, proclaimed:

> This is man's Government; the Government of all men alike; not that all men will have equal power and sway within it. Accidental circumstances, natural and acquired endowment and ability, will vary their fortunes. But equal rights to all the privileges of Government is *innate in every immortal being, no matter what the shape or color of the tabernacle which it inhabits.* Cong. Globe, 39th Cong., 1st Sess. 74(1865) (emphasis added).

For Abraham Lincoln's understanding of the Declaration as the founding document and its significance to life and liberty see his first inaugural address on the relationship of the Constitution and the Declaration. See also partial list of his statements found in Appendix VV at A-71a.

creative energy which breathed into his nostrils the breath of life, and he became a living soul, endowed with the rights of life and liberty ... Before that great law *the only question to be asked of a creature claiming its protection is this: Is he a man?* Every man is entitled to the protection of American law, because its divine spirit of equality declares that all men are created equal. Cong. Globe, 40th Cong., 1st Sess.542 (1867)(emphasis added).

Alexander Hamilton wrote:

The principal aim of society is to protect individuals, in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature; but which could not be preserved without that mutual assistance, and intercourse, which is gained by the institution of friendly and social communities. Hence it follows, that the first and primary end of human laws, is to maintain and regulate these *absolute rights* of individuals."... The Papers of Alexander Hamilton, Vol. I:1768-1778 Ed. Harold C. Syrett, Columbia Univ. Press, N.Y. (1961) "The Farmer Refuted".

The most powerful statements that the natural right to life extends to all, beginning as it does, from the moments of life within a mother's womb, and government powerless to deny, were expressed by James Wilson, of whom historians say that but for him the Constitution would not have been adopted:[69]

Life, and whatever is necessary for the safety of life, are the natural rights of man. ...With consistency, beautiful and unde-

[69] McMaster & Stone's History of Pennsylvania in the Convention, p. 758. James Dewitt Andrews, observed of his speech in November, 1787, that Curtis in his Constitutional History of the U.S. p. 309 claimed "is one of the most comprehensive and luminous commentaries on the constitution... . It drew from Washington a high encomium and gained the vote of Pennsylvania for the new government against the ingenious and captivating objections of its opponents." Bancroft is of the same opinion, Hist. of U.S., Vol. VI p. 387.

viating, human life, from its commencement to its close, is protected by the common law. In the contemplation of law, *life begins when the infant is first able to stir in the womb*. By the law, life is protected not only from immediate destruction, but from every degree of actual violence, ...These rights and duties are indeed, as has been observed, great pillars on which chiefly rest the criminal and the civil codes of the municipal law. It would surely be preposterous to undermine their foundation, with a view to give strength or stability to what they support - to unfix what rests on the immovable basis of nature, and to place it on the tottering institutions of man. I here close my examination into those natural rights which, ..., it is the business of civil-government to protect, and not to subvert, and the exercise of which it is the duty of civil government to enlarge, and not to restrain. The Works of James Wilson, Ed. by James DeWitt Andrews, Callaghan & Co., Chicago (1896) Vol. I & II p. 314-335.

Wilson acknowledged the natural right of a father to protect his child's life and the role of government to secure the rights:

> The defense of one's self, justly called the primary law of nature, ...is not confined merely to his own person; it extends to the persons of all those, to whom he bears a peculiar relation, of his wife, of his parent, of his child ... Id., 335.

> Government, ..., should be formed to secure and to enlarge the exercise of the natural rights of its members; and every government, which has not this in view, as its principal object, is not a government of the legitimate kind. Those rights result from the natural state of man; from that situation, in which he would find himself, if no civil government was instituted. Id. at 307, 308.[70]

(b)

[70] See statements of founders on the natural rights. Appendix WW at A-71f.

The Fourteenth Amendment itself is a source of the child's right to life. It is clear that the framers of the Thirteenth and Fourteenth Amendments equated the word "person" with "human being."[71]

Congressman John A. Bingham of Ohio, the author of Section 1 of the Fourteenth Amendment, used the word "person" interchangeably with "human being":

> The provision of our Constitution is, "no person shall be deprived of life, or liberty, or property without due process of law."...this new Magna Carta to mankind declares the rights of all to life and liberty and property; that no person by virtue of the American Constitution, but the majesty of American law, shall be deprived of life or liberty or property without due process of law. ...I would pass the bill, not only for the sake of giving present relief to the unfortunate human beings for whose special relief it is designed but I would pass this bill for the purpose as well of giving assurance...that no man shall ever, in the coming future,...be deprived of his life, of his liberty, or his property without due process of law. Cong. Globe, 37th Cong. 2d Sess. (April 11, 1862) 1683-1690.

Indeed, examples are numerous which show the basic assumption of the framers that "in the eyes of the Constitution, every *human being* within its sphere ... from the President to the slave, is a *person*." Cong. Globe, 37th Cong., 2d Sess. 1449 (1862)

[71] Senator Lyman Trumball, Illinois, noted on the Senate floor:
I consider that under the constitutional amendment Congress is bound to see that freedom is in fact secured to every person throughout the land; he must be fully protected in all his rights of person and property; and any legislation or any public sentiment which deprives any human being in the land of those great rights of liberty will be in defiance of the Constitution; ... Cong. Globe 39th Cong. 1st Sess. Dec. 19, 1865 Jan. 19, 1866, 322,323.

(Sen. Sumner) (first emphasis added).[72] It is also clear that the framers of the Fourteenth Amendment intended the Due Process Clause to be coextensive with the total class of all humanity, as a constitutional codification of the natural and inalienable rights.[73] John Bingham stated:

> Natural or inherent rights, which belong to all men irrespective of all conventional regulations, are by this Constitution guar-

[72] E.g., Cong. Globe, 39th Cong., 1st Sess. 77(1866) (Sen. Trumbull) ("any legislation or any public sentiment which deprives any human being in the land of those great rights of liberty will be in defiance of the constitution"); id. at 322-23 (Sen. Trumbull) ("great object of securing to every human being within the jurisdiction of the Republic equal rights before the law"); id. at 1159 (Rep. Windom) (rights to life, liberty, and pursuit of happiness are "rights of human nature," and the most basic "right of human nature [is] the right to exist"); id. at 1151 (Rep.Thayer) ("relief of human nature" secured in thirteenth amendment); 3 Cong. Rec. 1794 (1875) (Senator Allen G. Thurman) (may not deny equal protection to "any person" in the jurisdiction, "be he sane or be he insane, be he old or be he young, be he innocent or be he criminal, be he learned or be he ignorant") (emphasis added).

[73] Representative James S. Brown expressed the belief that the right to life required nothing other than human existence itself:

> *[D]oes the term "person" carry with it anything further than a simple allusion to the existence of the individual?* It certainly cannot be strained into any recognition of slavery, since the very recognition of personality excludes [an institution which] does not regard its victims as persons but as chattels. Cong. Globe, 38th Cong., 1st Sess. 1753 (1864) (emphasis added).

Representative Joshua R. Giddings stated:

> Our fathers, recognizing God as the author of human life, proclaimed it a "self-evident" truth that every human being holds from the Creator an inalienable right to live ...If this right be denied, no other can be acknowledged. If there be exceptions to this central, this universal proposition, *that all men, without respect to complexion or condition, hold from the Creator the right to live,* who shall determine what portion of the community shall be slain? And who may perpetuate the murders? Cong. Globe, 35th Cong., 1st Sess.App. 65-66 (1858) (emphasis in original).

anteed by the broad and comprehensive word 'person', as contradistinguished from the limited term citizen as in the 5th Article of Amendments...that 'no person shall be deprived of life, liberty, or property'...Cong. Globe, 37th Cong. 2d Sess. 1638 (1862)

Senator Arthur S. Boreman explained in regard to the then recently enacted Fourteenth Amendment:

> This ... includes every person that is found within these States, and guaranties to all life, liberty and property, and equal protection of the laws. ...It is not restricted to guarantying the right of a "citizen" ...but it extends to every "person", whether he has come from another State or not, to *every person residing anywhere, everywhere,* within the United States. So that while, before this amendment, if there was any question whether there were *any class of persons* in this country over whom the protection of the Constitution of the United States was not extended there cannot now be any longer any question on that subject. Cong. Globe, 42nd Cong., 1st Sess.App. 229 (1871) (emphasis added).[74]

[74] After careful examination of the antislavery background of the Civil War amendments and their legislative histories, one of the leading legal historians, Professor Jacobus tenBroek, wrote in his study of the Fourteenth Amendment:

> The Thirteenth Amendment nationalized the right of freedom. It thereby nationalized the equal right of all to enjoy protection in those natural rights which constitute that freedom. ...The Fourteenth Amendment reenacted the Thirteenth Amendment and made the program of legislation designed to implement it constitutionally secure or a part of the Constitution. ...The clause of equal protection of the laws ...(a)s the basic conception as the heart of the ... human and civil rights bills and debates upon them, as the common denominator of the drafts of the Fourteenth Amendment, as the pith and substance of section 1 in its final form, this was the meaning understood and accepted by friend and foe alike. Protection of men in their fundamental or natural rights was the basic idea of the clauses; equality was a modifying condition. ***The clause was a confirmatory reference to the affirmative duty of government to protect men in their natural rights.*** Jacobus tenBroek, the Anti-Slavery Origins of the Fourteenth Amendment (1951) 219-221.

The "justice principle" is employed in the interpretation of the Constitution. As an instrument of basic justice, due process cannot "offend 'a sense of justice'." *Rochin v. California*, 342 U.S. 165, 169-173 (1958). Can it possibly be that it does not "offend a sense of justice" that a child, even before birth, could be subjected to a painful dismemberment and death without justification? To extract the child's brain tissue? To extort money in a surrogacy arrangement? Because one who intended to conceive changed one's mind? If it does not offend our sense of justice, we are not the nation we intended to be.

3. If the State Has an Interest to Justify Protection of the Life of a Child Before Birth, the Child Possesses its Own Right to Life. The True Interest of the State Rests in its Parens Patriae Powers Which are Derivative of the Rights of the Child.

The recognized interest of the state "in life" (*Roe*, at 164, 165; *Casey*, 112 S.Ct. at 2804) implies the child's own interest in life. (See IIA2 above). Logically the power rests in the State's *parens patriae* jurisdiction, since it is now clear that the "life" is a helpless human being who experiences pain. *Parens patriae* includes the protection of the rights of individuals who cannot, by reason of

disability, assert their own rights.[75] When exercising such powers, the state can only vindicate the interest held by the individual it seeks to protect. *Snapp v. Puerto Rico*, 458 U.S. 592, at 600 (n.8 (1982). *Roe*'s recognition of the state interest in the life of the child before birth requires explicit acknowledgement of the child's own interest in life, otherwise the law would be exactly opposite to the principles upon which this nation was built, and the very purpose of the Fourteenth Amendment itself. See II.A.2.

4. Denying Children the Right to Live on Their Status as "Unborn" is a Denial of the Equal Protection of the Law.

Classifications that are subject to equal protection scrutiny under the Fourteenth Amendment may rise under the case law or common law of the state as well as under its legislative enactments. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964); *Shelley v. Kraemer*, 334 U.S. 117 (1948). Where the right to life itself is involved, derived from one's existence and being

[75] *Reno v. Flores*, ___ U.S. ___, 110 S.Ct. 2841, 2853, 2871 (1993) (where the custody of a minor by the parent or legal guardian fails, the government must exercise custody itself or appoint someone else to do it); *Cruzan v. Missouri Dept. of health*, __ U.S. __, 110 S.Ct. 2841 (1991) (state could refuse to permit withdrawal of life sustaining measures from comatose patient under *parens patriae* powers); *Schall v. Martin*, 467 U.S. 253 (1984) (if parental control falters, the State must exercise *parens patriae* powers); *Santosky v. Kraemer*, 455 U.S. 745, 766 (1982) (state can terminate constitutionally protected parental rights to protect a child.)

"natural and inalienable," the classification created by New Jersey requires a showing of a compelling state interest. *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969); *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533, 561-562 (1964); *Kraemer v. Union Free School District*, 395 U.S. 621, 626-628 (1969); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Cf. Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

## B. A MOTHER'S RIGHT MUST ONLY REFLECT HER TRUE INTERESTS AND MUST ACCOUNT FOR THE FACT THAT HER CHILD IS A HUMAN BEING WHO EXPERIENCES PAIN.

In *Casey*, both the Joint Opinion and the Dissent stated it was necessary *Roe* be reexamined.[76] However, by not reexamining the question whether the child possesses constitutional rights prior to birth, *Casey* failed to reexamine *Roe* in its most essential element.[77] It is beyond reasonable dispute that a child twenty six weeks after conception is in fact a human being whether prematurely born or remaining within a mother's womb. By this acknowledgement the conflict shall naturally resolve.[78]

[76] Casey, 112 S.Ct. at 2804 (Rehnquist, C.J., dissenting) 112 S.Ct. at 2855.

[77] See, similar observation of Justice Scalia, dissenting, 112 S.Ct. at 2875.

[78] Justice Stevens alone addresses the question in Casey. But his statement that the Joint opinion implies that the child is not a "constitutional person" is no more true than the observation that the Joint Opinion implies that a child, after viability, is unequivocally a person in fact. The latter contradicts the former. *Casey* addressed neither. See, *Casey*, 112 S.Ct. at 2807.

The primary objection to *Roe* is that it is unjust and its consequences too great for a person of conscience to ignore. That the injustice is built upon unsound application of constitutional principles can best be appreciated when the problem is expressed in its simplest terms: the relative interests of a mother and the competing "interests of the State" have not been satisfactorily identified and their relative weight when balanced have never accurately reflected the real interests of either.[79]

The problem has been created by ignoring the fact of the child's existence stemming from either the Court's good faith belief in 1973 that it could not reach reliable judgments about the facts, or a fear that recognition of the facts are construed as an imposition

[79] This is substantially acknowledged in *Casey*, 112 S.Ct. at 2818. The mother's right was defined in *Roe* as "fundamental" throughout pregnancy. The state's interest in protecting the life of the child was not recognized before "viability" and thereafter the state's interest (described as one to protect "potential life") became "compelling." *Roe*, 410 U.S. at 163, 164.

In *Casey*, a mother's rights are neither referred to as "fundamental" nor the state's interest as "compelling" but the result is basically the same: a mother may terminate the life of her child before "viability" but the state can prohibit it thereafter. In both analyses it is never precisely defined what is occurring: does the interest of the mother diminish [or is it now waived? See, *Casey*, 112 S.Ct. at 2817] or does the state's interest become greater (as stated in *Roe*?) The waxing and waning of either set of interests has often been the subject of criticism. See, *Thornburgh v. A.C.O.G.*, 476 U.S. 747, 814, 828 (O'Connor, J., dissenting) "I do, however, remain of the views expressed in my dissent in *Akron*, 462 U.S. at 459-466. The state has compelling interests in ensuring the general health and protecting potential human life, and these interests exist 'throughout pregnancy')" Id. at 461. *Thornburgh v. A.C.O.G.*, 476 U.S. at 785 (White, J., dissenting) "the state's interest, if compelling after viability, is equally compelling before viability.") *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) ("We do not see why the state's interest in protecting potential human life should come into existence only at the point of viability and ... therefore be a rigid law allowing state regulation after viability but prohibiting before viability.") The interests of the state and those of a woman (both the same throughout pregnancy) are at odds with the balancing result that allows prohibition of abortion at one point in time but not at another.

of a "subjective" view. Yet, the court, by failing to address the fact of the child's life, has rendered a *de facto* judgment, imposing its view upon all of society that the lives of this class of children have no value; precisely the judgment about the lives of people that governments, especially courts, have no power to make. [See, IIA.2].

1. Nature and Scope of the Mother's Real Interests.

*Roe* identified a woman's interests involved. The Court listed five potential harms to a woman used to conclude that her *Griswold* rights include abortion. *Roe*, at 153. The first, judgments about a mother's health where her life is in danger involves not only private judgments, but her right to life itself. However, the other concerns listed by *Roe* do not justify terminating the life of a child: (1) maternity or additional offspring may cause a distressful life; (2) mental and physical health may be taxed by child care; (3) distress associated with an unwanted child; and (4) additional difficulties and continuing stigma of unwed motherhood. That these are legitimate concerns that implicate the right of privacy, there is no doubt. But these are reasons to avoid pregnancy in the first instance or to exercise a free choice after birth. New Jersey does not have a compelling interest to interfere with the private choice of a couple to prevent pregnancy. *Griswold*,

*supra*. These interests do not justify taking the life of a human being where the couple fail to exercise their *Griswold* rights or they intended to conceive. If these were truly reasons to abort a child then a father would have a coexisting right to demand an abortion. All of these [except "maternity"] are experienced by him even when the child is born out of wedlock. These burdens no longer fall on her alone.[80] If these interests do not support his right to an abortion, then they do not support that of a mother. *Casey* elaborates on the concern pertaining to maternity:

> "The mother who carries a child to term is subject to anxieties, the physical constraints, to pain that only she must bear." *Casey*, 112 S.Ct. at 2807.

But *Casey* does not suggest that this justifies taking the life of another human being. *Casey* recognizes that the interest in protecting the life of the unborn at "viability" is greater than that of the mother. Yet "viability" is precisely when these anxieties, physical constraints and pains are realized in their most acute form. *Casey*

[80] The fact that a mother is the parent who carries the child does not alone give her the singular power over life and death. Both parents are equal contributors to life, with equal obligations following birth. The significant contribution of a mother who bears the burden of maternity is fairly and justly reflected in the New Jersey law which vests in her the right to choose to be the primary custodian of the child if the parents are separated at birth and disagree on custody. *Baby M*, 537 A.2d 1227, 1261 (1988). The fact that she carries and bonds with the child directly bears upon the health and welfare of the mother and child following birth, not the power over actual life itself.

recognized that the responsibility for the avoidance of these inconveniences rests upon the mother before they are realized.[81] The same reasoning applies before conception.

To help focus on the true nature of a mother's interests the following three hypothetical situations, the first two based upon the facts of *Baby M*, 537 A.2d 1227 (1988), are of assistance:

1. Bill Stern married his wife, Betsy, with the intent of having a family. After the death of his parents, Bill had no one genetically related to him because most of his family was killed in the holocaust in Germany. They postponed starting a family so Betsy could finish graduate school, medical school, and then her residency. After a decade they decided to have a child. After Betsy conceived, they made plans for the baby's birth. Subsequently, Betsy changed her mind, and at five months, she told Bill she decided to have an abortion.

2. Bill and Betsy entered into a surrogacy contract with Marybeth Whitehead. Marybeth became pregnant through artificial insemination using the sperm of Mr. Stern. The child was genetically related to Mrs. Whitehead. As the pregnancy progressed she changed her mind about terminating her paternal rights. She told Mr. Stern, while five months pregnant, she could not surrender the baby. Over the next two months Mrs. Whitehead negotiated a custody arrangement. Mr. Stern refused. Mrs. Whitehead then decided to have an abortion.

A third is based on *Anna J. v. Mark C.*, 286 Cal. Rptr. 369 (1991):

[81] *Casey* observes that cutting off the mother's right to abortion has a "sense of fairness"... "In some broad sense it might be said that a woman who fails to act before viability has consented to the state intervention on behalf of the developing child." 112 S.Ct. at 2817.

> 3. Anna J. was a single mother who entered into a written surrogacy contract with Mark C. and his wife to carry a child conceived outside Anna's womb using an egg donated by Mrs. C. and the sperm of Mr. C. Anna was not genetically related to the child. Anna felt that she was not being treated fairly by Mr. and Mrs. C. and demanded greater compensation. Mark C. observed that "a deal is a deal" and refused. When the baby was six months old Anna J. advised Mr. and Mrs. C. that she would have an abortion if they did not satisfy her demands. Mark C. offered more money to save the child's life. The child approached "viability" and Mark C. made a final offer. Shortly after "viability", Anna J. telephoned Mr. and Mrs. C. to make even greater demands. Mr. C. advised her he would make no further offer. Anna then advised that she planned to go to New Jersey where she can obtain an abortion at any time, and that "abortion is her constitutional right".[82]

What are the interests the Court seeks to protect here? There is a child held hostage and then killed. The interests found in *Roe* no more justify these acts then they would if a parent took the life of an infant two days after birth to avoid the stress of child rearing. *See, Thornburgh v. A.C.O.G.*, 476 U.S. at 787-795 (White, J., dissenting). The true interest of a woman is that her pregnancy be the result of a voluntary act.[83]

2. Identifying the Real Nature of the Life in Question.

[82] See *Anna J. v. Mark C., supra*, at FN 11. The irony of the *Anna J.* case is that California found that *Anna J.* did not have parental rights following birth, although under *Roe* she has a right to take the child's life.

[83] Because *Roe* declared abortion a "right" the *Roe* Court undoubtedly influenced some to act in a way they otherwise would not. As the world of the *Anna J.* hypothetical continues to evolve it must be recognized that *Roe* made it possible, and only this Court can stop the harm.

Ever since *Roe* declined to find when life began, the Court has labored under the disability of having never defined the nature of the life which was the subject of its opinions and the basis for an "interest" of the states. This failure and the resultant and substantial uncertainty surrounding the nature of the life is reflected in the language of the Court and imprecise definition of the "state's interest." The Court most often refers to the child as "potential life" and the state's interests as one in 'potential life'. *See, e.g., Roe*, 410 U.S. at 163 (1973); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).[84] Nowhere is this failure and uncertainty more apparent than in *Casey*:

> Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family and society which must confront the knowledge that these procedures exist, procedures

[84] In *Casey* the Joint Opinion refers to the child as: "the life or potential life" (112 S.Ct. at 2807); "postconception potential life" (at 2811); "fetal life" (at 2811); "the life of the unborn" (at 2816); "life" (at 2816); "life or potential life of the unborn" (at 2817); "potential life" (at 2817); and "the life of the fetus that may become a child" (at 2804). The Chief Justice refers to the child as "a fetus" (at 2859); "unborn human life" (at 2867); "unborn life" (at 2868) and "unborn child" (at 2871); Justice Stevens retains the use of "potential life" (at 2840, 2841); Justice Blackmun refers to "potential life" (at 2847) and "prenatal life" (at 2847). Justice Scalia observes on this:

> The whole argument of abortion opponents is that what the Court calls the fetus and what others call the unborn child *is a human life*. Thus, whatever answer *Roe* came up with after conducting its "balancing" is bound to be wrong, unless it is correct that the human fetus is in some critical sense merely potentially human. Scalia, J. dissenting, 112 S.Ct. at 2875.

> some deem nothing short of an act of violence against innocent human life; *and depending on one's beliefs, for the life or potential life that is aborted. Casey*, 505 U.S. ___, 112 S.Ct. at 2807 (emphasis added).

This statement reflects the failure of the Court to reach a conclusion concerning the nature of the life. Either this is a human being or it is not. It is not a "belief", religious or otherwise. It is a matter of fact. This determination affects the nature of a mother's right. If she is killing her own child or not is material, if not decisive. There is no longer any valid reason to avoid this issue.

## C. J.M. HAS THE STANDING TO PROSECUTE THE RIGHTS OF HIS CHILD, AND TO DEFEND THE LIFE OF HIS CHILD.

### 1. The Unique Relationship Between J.M. and His Child Gives Him Standing to Prosecute the Child's Case.

J.M.'s relationship with his child is unique because both have the interwoven common interest in the child's life. The child's interest to have his or her rights prosecuted coincide with the father's interest to defend his child's life. In *Griswold v. Connecticut*, 381 U.S. 479, this Court held that the executive director of a Planned Parenthood League of Connecticut and a licensed physician, had standing to raise the constitutional rights of married couples. *Griswold*, 381 U.S. at 481. Both had been convicted of violating Connecticut's birth control law and the

relationship of the defendants to the couple whose rights were being asserted established their standing to raise the rights of the couples.[85]

A father has traditionally enjoyed standing to protect the interests of his children. A parent, in New Jersey, is the natural guardian of the interests of his child. See R. 4:26-2 (the natural parent is the only guardian to represent the interest of a child in a law suit who need not be appointed by court order). The relationship of a father to a child born out of wedlock gives rise to rights and obligations of a father independent of the nature of his relationship with the child's mother. See, *N.J.S.A.* 9:17-40, et. seq. (imposing obligations on a natural father to support a child born out of wedlock and granting him parental rights). Under New Jersey law the guardianship for nurture vests in a father, and this "natural guardianship" is for bringing up and taking care of the child. See, *N.J.S.A.* 3B:12-12; *Caruso v. Caruso*, 139 A.812

[85] To support this conclusion the court cited *Truax v. Raich*, 239 U.S. 33 (where an employee was permitted to assert the rights of his employer); *Pierce v. Society of Sisters*, 268 U.S. 510 (where the owners of private schools could assert the rights of potential pupils and their parents); and *Barrows v. Jackson*, 346 U.S. 249 (where a white defendant, party to a racially restrictive covenant, was being sued for damages by the covenantor because she had conveyed her property to negroes, could raise the rights of prospective negro purchasers, although no negro was a party to the suit). *Griswold*, 381 U.S. at 481.

(1927). The statutory scheme for intestate succession creates rights in both the father and child who inherit from one another based only upon a genetic relationship. *N.J.S.A.* 3B:5-2.

The relationship of father and child, at every moment from conception to death, implicates the fundamental rights of both, rendering the father a person with a profound interest in the child's welfare. Whether or not they are directly and substantively implicated, the father's Constitutional rights to [1] companionship and association (e.g., *Stanley v. Illinois*, 405 U.S. 645 (1972); *Santosky v. Kraemer*, 455 U.S. 745 (1982); [2] equal protection, (e.g., *Craig v. Boren*, 429 U.S. 190 (1976); *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Califano v. Webster*, 430 U.S. 313 (1977); (see A-415 to A-420); [3] procreate (e.g., *Skinner v. Oklahoma*, 316 U.S. 535 (1942); see A-420); [4] discharge his obligation to his children (e.g., *Pierce v. Society of Sisters*, 268 U.S. 510, 518 (1925); see A-421); and [5] defend life (e.g., Art. 1, §1, N.J. Const. 1947; Due Process Clause, Fourteenth Amendment U.S. Const.; see A-367 to A-369), surely form the foundation to distinguish his relationship with the child as unique and sufficient to create in him standing to speak for his child. *Griswold*, supra.

In the abortion context no one else who also has standing has acted to protect the interests of the child. The mother, who has a protected relationship with her unborn child, *Lehr v. Robertson*, 463 U.S. 248, not only refuses to exercise her rights, but is the party seeking to terminate the child's life. On the other hand, New Jersey, which has the power to exercise its *parens patriae* jurisdiction to protect the child, has acted to assist her. It would be a separate constitutional deprivation of the child's constitutional rights, once recognized, to fail to extend standing to a father under such circumstances.[86] It is difficult to imagine a more egregeous violation of the child's right than if a child's life is terminated for failure to recognize a father's standing. They have interwoven interests and rights to life and to defend life under the Due Process Clause of the Fourteenth Amendment. [See IIA2].

2. *Casey* Does Not Preclude Recognition of J.M.'s Standing to Prosecute the Rights of His Child Before Birth.

*Casey* does not prohibit recognition of J.M.'s standing, because *Casey* never addressed the humanity of the child. If it were so in-

[86] C.f. *Santosky v. Kramer*, 455 U.S. at 760 (where this Court expressly recognized that the fundamental rights which protect the parent - child relationship are shared by both: "...the child and his parents share a vital interest in preventing erroneous termination of their natural relationship").

terpreted, *Casey* would clearly be in conflict with prior precedent once the child is recognized as a human being. *Casey* would confuse two separate rights of the mother and ignore the real right of the father. A father's rights are for the companionship, care, custody and management of his children. *Stanley*, 405 U.S. at 650. *Casey* only examines the question of whether a father may require his "consent" for abortion. *Casey*, 112 S.Ct. at 2830-31. A father *never* has an interest in an abortion, so his permission could never be required. His *only* interest is in preserving the child's life and their relationship. But any analysis of *Roe* and *Casey* forming grounds to terminate a father's rights, or refusing to recognize them at all, which is not consistent with the welfare of the child is at odds with precedent defining parental rights.[87] *Casey* does

[87] Two areas of inquiry determine whether a particular termination is constitutional: (a) whether the particular parent possesses a constitutional right; and (b) whether the grounds for termination satisfy Due Process criteria. In both inquiries, the welfare of the child is the most critical determinant. The grounds for termination have always been related to what is best for the child: only if continuing the relationship would be harmful to the child, could a termination take place. *E.g.*, *Santosky v. Kramer*, 455 U.S. 745 (1982); *see Stanley v. Illinois*, 405 U.S. 645 (1972); *Lehr v. Robertson*, 463 U.S. 248 (1983). As grounds for termination of the rights of J.M., *Roe* conflicts with the termination analysis. Only J.M. sought to protect the best interests of the child, while the mother and the state sought to harm the child. A second inquiry is whether a parent has a constitutionally protected relationship with the child. Here too, the welfare of the child is a critical factor. A father of a child born out of wedlock enjoys a constitutionally protected relationship with his child. *Stanley v. Illinois*, supra. A natural father is not always recognized as having a constitutionally protected relationship. *See Quilloin v. Walcott*, supra; *Lehr v. Robertson*, supra; *Michael H. v. Gerald D.*,

not address the child at all, otherwise, *Roe*, would have created a right to kill a child and *Casey*, building upon *Roe*, would recognize this right as greater than a parent's right to protect the child. There are implicated two separate rights of the mother: her own right to companionship with her child, and her *Griswold* privacy rights. Her right to companionship exists even during pregnancy. C.f. *Lehr, supra*. But this right, like that of the father's, is only to preserve the life of the child and their relationship. This is the right that *Casey* compares with the father's and finds "equal" after birth. 1128 S.Ct. at 2830. Once the child exists, it is impossible that her companionship interest, because of its nature, is that which entitles her to terminate the child's life and the father's rights.

491 U.S. 110 (1989). *Quilloin, supra,* explains under what circumstances the Court would recognize an unwed father's right:

> We have little doubt that the Due Process Clause would be offended 'if the state were to attempt to force the breakup of the natural family, over the objection of parents, and their children without some showing of unfitness and for the sole reason to do so was thought to be in the child's best interest'. *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-863, (1977). But this is not the case in which the unwed father at any time had, or sought, actual or legal custody of his child. Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child had never before lived. Rather, the result of the adoption in this case is to give full recognition of the family already in existence, a result desired by all concerned, except the appellant. 434 U.S. at 255.

This statement explains the difference in treatment of fathers' rights in *Lehr v. Robertson, supra*, In *Quilloin*, *Lehr* and *Michael H.*, however, the dominant reason for the Court's refusal to recognize the father's rights was because there was an existing family which sought to protect the child's welfare. Therefore, the recognition of a father's rights relates to and depends upon whether a family exists or the mother competes to protect the child's welfare.

The fact that the mother is the parent who carries the child has always been considered relevant to her rights following birth when she is competing for custody with the natural father. This is our understanding of *Lehr*. This fact relates to human bonding and impacts upon the health of both the mother and child. New Jersey law gives the mother the right to choose to be the primary custodian when the natural parents do not live together and disagree on custody at the time of birth. *Matter Of Baby M*, 537 A.2d 1227, 1261 (1988). Therefore, the "inescapable biological fact" that a mother carries the child physically relates to her rights when she seeks to protect the child. To suggest that that fact supports a right to kill the child is contrary to constitutional principles dealing with termination rights. The fact that a mother wants to kill her own child would be a basis for terminating her constitutional rights. The privacy right to preserve the child cannot co-exist with the right to kill the child. They are repugnant.

## D. THE PRINCIPLES OF BALANCING COMPETING CONSTITUTIONAL RIGHTS OF PRIVATE CITIZENS REQUIRES NEW JERSEY TO PROTECT THE LIFE OF THE CHILD PRIOR TO BIRTH AT ALL STAGES EXCEPT IN INSTANCES WHEN THE MOTHER'S LIFE IS AT STAKE OR IN SOME CASES OF RAPE OR ITS EQUIVALENT.

This Court has created the criteria for the balancing of competing rights of individuals. First, where possible, the state must

act in a way that no competing interest is frustrated. The court must examine the relative interest of the parties because it is the interest that must be preserved. Second, if the competing rights cannot be reconciled because the conflict necessarily requires that one set of interests shall be frustrated, the Court must preserve the rights of the individual who shall incur the greatest harm. Compare, *Zacchini v. Scripps - Howard Broadcasting, Co.*, 433 U.S. 562 (1977);[88] *Rowan v. U.S. Post Office Department*, 397 U.S. 728 (1970); *Runyon v. McCary*, 427 U.S. 160 (1976).[89]

The true underlying interests which are sought to be protected are the controlling factor in a balancing analysis. *Zacchini, supra*; *Rowan, supra*; *Runyon, supra*. *Roe* identifies the five interests sought to be protected.[90] The child's right to live is "natural and unalienable," based upon the fact of the child's existence and the

[88] In *Zacchini* the court examined the interest of news agencies, and that of an entertainer both of whom sought to protect their own first amendment rights. The Court preserved the interests of both by requiring that the law compensate an entertainer when his act is covered by television news without his permission. The balancing result accommodated both a news agency's interest in making a story public and the entertainer's interest in the commercial stake in his act. The entertainer could not enjoin the story, thus frustrating the agency's interest, but neither could the agency run the story free of charge, thereby frustrating the interests of the entertainer.

[89] In *Runyon* it was held that the right of negroes to be free from racial discrimination must be preserved at the expense of another's right of association where a private school prohibited students based solely on race, because freedom of association permitting parents to send their children to the school of their choice, could not provide affirmative protection to racial discrimination.

[90] [1] Maternity may cause a distressful life and future; [2] Mental and physical health may be taxed by child care; [3] Distress associated with unwanted children; [4] The stigma of unwed motherhood; [5] Imminent and life threatening physical illness for the mother if the child's life is not terminated. *Roe*, 410 U.S. at 153.

child's personal interest in life (see, IIA2 above). Its loss is the most devastating, irreversible, and uncompensible loss of all. This is the interest that must be balanced against those of the mother identified by *Roe*.

In protecting the mother's interests the state must not frustrate the child's interest in life and the father's interests in defending the child's life. Where conception is the result of voluntary conduct a woman's interest is protected from unwanted pregnancy, distress in child rearing, maternity and stigma by permitting the use of contraception. That it is convenient, easier or less expensive to terminate the life of the child during any stage of pregnancy "cannot stand against the preciousness of a single human life." *Gleitman v. Cosgrove*, 227 A.2d 689, 693 (1967).

Although New Jersey policy is to support the mother to enable her to stay with her child following birth if she desires it, the policy is to protect the relationship of mother and child following birth. See generally, *In the Matter of Baby M*, supra. This relationship is more intimate, more precious and more deserving of protection than any other in the human experience. But after birth, the stress and "stigma" (if there still is a stigma) is not imposed upon her. She can avoid both by allowing the father (or someone else) to raise the child. The mother's true interests are protected because she has effective methods to satisfy those interests prior to and after birth. Only by allowing the baby to live, can the interests of the child and father be preserved.

When a mother's interest is avoiding the consequence of medical conditions which pose a significant threat to her own life, there

is a true conflict. In this instance the mother's interest must prevail because: (1) if she carried the child not only would her life, perhaps, be lost, but also that of the child; (2) Although the value of the two lives are equal, there is an inherent deprivation of life, and a mother's role in giving life if a mother's life is subordinate to the child she bears; (3) The law which values the life of the child over the mother under such circumstance would have a chilling effect on women who might otherwise conceive; and (4) this is truly a zone of decision making and sacrifice that no government could require: government does not grant the right to life of a mother any more than it does the child and has no authority to demand the sacrifice.[91]

III A RECOGNITION OF THE CHILD'S RIGHT TO LIFE IS CONSISTENT WITH PRINCIPLES OF *STARE DECISIS*.

*Casey* did not address the factual or legal component of the question of whether the child possesses rights prior to birth. Yet, *Casey* still found it necessary to rely heavily upon principles of *stare decisis* to preserve a watered-down affirmance of *Roe*, 112 S.Ct. at 2808-2812. The majority discussed four areas of concern: (1) there is no change of fact; (2) *Roe* is not inconsistent with other principles of constitutional law; (3) reliance; and (4) work-

[91] Where conception is not the result of voluntary conduct, in instances of rape and its equivalent, her interests in avoiding pregnancy have not been satisfied. These circumstances may create a substantial risk to a mother's life if the pregnancy ran full term, and the balancing of the relative rights may have the same result as where the mother's life is at stake.

ability. at 2808-2812. Petitioner has addressed the first two of these at IA and IIC.

For "reliance" to be a true bar to overruling a case, the particular conduct engaged in by those who rely upon a specific holding must pose no harm to others. *Payne v. Tennessee*, 111 S.Ct. 2597, 2610-2611 (1991). But if the conduct in question is harmful, then the fact that the decision encourages the conduct is actually a reason to overrule the decision, not perpetuate the harm. Once it is recognized that the life of a child is being taken, the fact that one relied upon an erroneous Court decision is no basis to perpetuate the cruel conduct. The reliance argument also ignores the fact that conception may be intentional.[92]

*Casey* is reminiscent of the reliance argument advanced by John W. Davis on behalf of *South Carolina in Brown v. Bd. Ed.*, 347 U.S. 483 (1954). In arguing that racial segregation must be per-

[92] Another question is thus posed: does one have a right to abortion because one has a right to enter into irresponsible and immature conduct? Or does one have a right to enter into irresponsible conduct because one has this right to an abortion? If it is the latter, one must be permitted the irresponsible conduct, even if it is unnecessary to preserve the true privacy interest. This is because the privacy interest has been viewed as an all encompassing "right to an abortion" without any relation to the real underlying interest. If the former, then the right is one of enjoying irresponsible conduct without concurrent obligations.

petuated because many states have "relied" upon *Plessey v. Ferguson*, 163, U.S. 537 (1896), Mr. Davis argued:

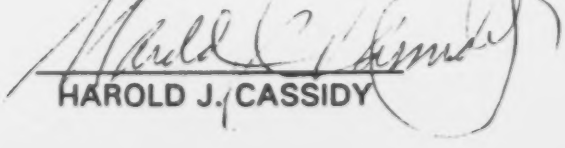
> We *relied* on the fact that this court, not once but seven times ... pronounced in favor of the "separate but equal" doctrine. We *relied* on the fact that the Courts of last appeal in some sixteen or eighteen states have passed upon the validity of the "separate but equal" doctrine vis-a-vis the Fourteenth Amendment. We *relied* on the fact that Congress has continuously since 1862 segregated its school in the District of Columbia. *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law*. Vol. 49A, at 490.

Indeed all of the parties seeking to perpetuate racial segregation in the consolidated cases referred to as *Brown v. Bd. of Ed.* argued not only reliance, but that the conduct was so accepted that desegregation would be too difficult to correct and on that ground alone segregation should be reaffirmed.

When it is recognized that the unborn child is a person in fact, the unworkable nature of *Roe* is apparent. No rule of law that permits one person to take the life of another with impunity will go ignored by people of conscience and the rule of law will engender no respect. Law unworthy of respect is inherently unworkable.

## CONCLUSION

The Court should grant the writ and decide these issues.[93]



HAROLD J. CASSIDY

## APPENDIX A

## LIST OF ONE HUNDRED AND SEVENTY-FOUR CASES WHICH THE U.S. SUPREME COURT OVERRULED PRIOR DECISIONS

1. *Hudson v. Guestier*, 6 Cr. (10 U.S. 281, 285 (1810) (overruling *Rose v. Himley*, 4 Cr. (8 U.S.) 241 (1808)).

2. *Gordon v. Ogden*, 3 Pet. (28 U.S.) 33, 34 (1830) (overruling *Wilson v. Daniel*, 3 Dall. (3 U.S.) 401 (1798)).

3. *Greene v. Lessee of Neal*, 6 Pet. (31 U.S.) 291 (1832) (overruling *Patton v. Easton*, 1 Wheat. (14 U.S.) 476 (1816); *Powell's Lessee v. Harmon*, 2 Pet. (27 U.S.) 241 (1829)).

4. *Louisville Railroad Co. v. Letson*, 2 How. (43 U.S.) 497, 554-556 (1844) (overruling *Commercial and Railroad Bank v. Slocomb*, 14 Pet. (39 U.S.) 60 (1840) and *Strawbridge v. Curtiss*, 3 Cr. (7 U.S.) 267 (1806); *Qualifying Bank of the United States v. Deveaux*, 5 Cr. (9 U.S.) 61 (1809)).

5. *The Genessee Chief*, 12 How. (53 U.S.) 443, 456 (1851) (overruling *The Thomas Jefferson*, 10 Wheat. (23 U.S.) 428 (1825); *The Orleans v. Phoebus*, 11 Pet. (36 U.S.) 175 (1837)).

6. *Gazzam v. Phillip's Lessee*, 20 How. (61 U.S.) 372, 377-378 (1858) (overruling *Brown's Lessee v. Clements*, 3 How. (44 U.S.) 650 (1845)).

7. *Suydam v. Williamson*, 24 How. (65 U.S.) 427 (1861) (overruling *Williamson v. Berry*, 8 How. (49 U.S.) 495 (1850); *Williamson v. Irish Presbyterian Congregation*, 8 How. (49 U.S.) 565 (1850); *Williamson v. Ball*, 8 How. (49 U.S.) 566 (1850)).

8. *Mason v. Eldred*, 6 Wall. (73 U.S.) 231, 238 (1868) (overruling *Sheehy v. Mandeville*, 6 Cr. (10 U.S.) 253 (1810)).

9. *The Belfast*, 7 Wall. (74 U.S.) 624, 641 (1869) (overruling *Allen v. Newberry*, 21 How. (62 U.S.) 244 (1858) (in part)).

10. *Knox v. Lee* (The Legal Tender Cases), 12 Wall. (79 U.S.) 457, 553 (1871) (overruling *Hepburn v. Griswold*, 8 Wall. (75 U.S.) 603 (1870)).

11. *Trebilcock v. Wilson*, 12 Wall. (79 U.S.) 687 (1871) (overruling *Roosevelt v. Meyer*, 1 Wall (68 U.S.) 512 (1863)).

12. *Hornbuckle v. Toombs*, 18 Wall. (85 U.S.) 648, 652-653 (1874) (overruling *Noonan v. Lee*, 2 Bl. (67 U.S.) 499 (1863); *Orchard v. Hughes*, 1 Wall. (68 U.S.) 73, 77 (1864); *Dunphy v. Kleinsmith*, 11 Wall. (78 U.S.) 610 (1871)).

13. *Union Pac. R. Co. v. McShane*, 22 Wall. (89 U.S.) 444 (1874) (overruling *Kansas Pac. R. Co. v. Prescott*, 16 Wall. (83 U.S.) 603 (1873) (in part)).

14. *County of Cass v. Johnston*, 95 U.S. 360 (1877) (overruling *Harshman v. Bates County*, 92 U.S. 569 (1875)).

15. *Fairfield v. County of Gallatin*, 100 U.S. 47 (1879) (overruling *Town of Concord v. Savings-Bank*, 92 U.S. 625 (1875)).

16. *Tilghman v. Proctor*, 102 U.S. 707 (1880) (overruling *Mitchell v. Tilghman*, 19 Wall. (86 U.S.) 287 (1873)).

17. *Kilbourn v. Thompson*, 103 U.S. 168, 192-200 (1881) (overruling *Anderson v. Dunn*, 6 Wheat. (19 U.S.) 204 (1821)).

18. *United States v. Phelps*, 107 U.S. 320, 323 (1883) (overruling *Shelton v. The Collector*, 5 Wall. (72 U.S.) 113, 118 (1867)).

19. *Kountze v. Omaha Hotel Co.*, 107 U.S. 378, 387 (1883) (overruling *Stafford v. The Union Bank of Louisiana*, 16 How. (57 U.S.) 135 (1853)).

20. *Morgan v. United States*, 113 U.S. 476, 496 (1885) (overruling *Texas v. White*, 7 Wall. (74 U.S.) 700 (1869).

21. *Wabash, S.L. & P. Ry. Co. v. Illinois*, 118 U.S. 557 (1886) (overruling *Peik v. Chicago & N.W. Ry. Co.*, 94 U.S. 164 (1877) ("substantially though not expressly overruled")).

22. *Phila. Steamship Co. v. Pennsylvania*, 122 U.S. 326 (1887) (overruling *State Tax on Railway Gross Receipts*, 15 Wall. (82 U.S.) 284 (1873) ("basic grounds of decision repudiated")).

23. *In re Ayers*, 123 U.S. 443 (1887) (overruling *Osborn v. Bank of the United States*, 9 Wheat. (22 U.S.) 738 (1824)).

24. *Leloup v. Port of Mobile*, 127 U.S. 640, 647 (1888) (overruling *Osborne v. Mobile*, 16 Wall. (83 U.S.) 479 (1873)).

25. *Leisy v. Hardin*, 135 U.S. 100, 118 (1890) (overruling *Peirce v. New Hampshire*, 5 How. (46 U.S.) 504 (1847)).

26. *Brenham v. German-American Bank*, 144 U.S. 173, 187 (1892) (overruling *Rogers v. Burlington*, 3 Wall. (10 U.S.) 654 (1866); *Mitchell v. Burlington*, 4 Wall. (71 U.S.) 270 (1867)).

27. *Roberts v. Lewis*, 153 U.S. 367, 377 (1894) (overruling *Giles v. Little*, 104 U.S. 291 (1881)).

28. *Pollock v. Farmer's Loan & Trust Co.*, 158 U.S. 601 (1895) (overruling *Hylton v. United States*, 3 Dall. (3 U.S.) 171 (1796)).

29. *Garland v. Washington*, 232 U.S. 642, 646 (1914) (overruling *Crain v. United States*, 162 U.S. 625 (1896)).

30. *United States v. Nice*, 241 U.S. 591, 601 (1916) (overruling *In re of Heff*, 197 U.S. 488 (1905)).

31. *Pennsylvania R.R. Co. v. Towers*, 245 U.S. 6, 17 (1917) (overruling *Lake Shore & M.S. Ry. Co. v. Smith*, 173 U.S. 684 (1899) (in part)).

32. *Rosen v. United States*, 245 U.S. 467, 470 (1918) (overruling *United States v. Reid*, 12 How. (53 U.S.) 361 (1851)).

33. *Boston Store v. American Graphophone Co.*, 246 U.S. 8, 25 (1918); *Motion Picture Co. v. Universal Film Co.*, 243 U.S. 502, 518 (1917) (overruling *Henry v. Dick Co.*, 224 U.S. 1 (1912)).

34. *Terrell v. Burke Constir. Co.*, 257 U.S. 529, 533 (1922) (overruling *Doyle v. Continental Ins. Co.*, 94 U.S. 535 (1877); *Security Mutual Life Ins. Co. v. Prewitt*, 202 U.S. 246 (1906)).

35. *Lee v. Chesapeake & Ohio Ry.*, 260 U.S. 653, 659 (1923) (overruling *Ex parte Wisner*, 203 U.S. 449 (1906); qualifying; *In re Moore*, 209 U.S. 490 (1908)).

36. *Alpha Cement Co. v. Massachusetts*, 268 U.S. 203, 218 (1925) (overruling *Baltic Mining Co. v. Massachusetts*, 231 U.S. 68 (1913)).

37. *Ches. & Ohio Ry. Co. v. Leitch*, 276 U.S. 429 (1928) (rehearing) (overruling *Chesapeake and Ohio Ry. Co. v. Leitch*, 275 U.S. 507 (1927) (not recorded)).

38. *Gleason v. Seaboard Ry.*, 278 U.S. 349, 357 (1929) (overruling *Friedlander v. Texas & Railway Co.*, 130 U.S. 416 (1889) (in part)).

39. *Farmers Loan Co. v. Minnesota*, 280 U.S. 204, 209 (1930) (overruling *Blackstone v. Miller*, 188 U.S. 189 (1903)).

40. *East Ohio Gas Co. v. Tax Comm.*, 283 U.S. 465, 472 (1931) (overruling *Penna. Gas Co. v. Pub. Service Comm.*, 292 U.S. 23 (1920)).

41. *Chicago & E.I.R. Co. v. Commission*, 284 U.S. 296 (1932) (overruling *Erie R.R. Co. v. Collins*, 253 U.S. 77 (1920); *Erie R.R. Co. v. Szary*, 253 U.S. 86 (1920)).

42. *Fox Film Corp. v. Doyal*, 286 U.S. 123 (1932) (overruling *Long v. Rockwood*, 277 U.S. 142 (1928)).

43. *New York ex rel. Northern Finance Corp. v. Lynch*, 290 U.S. 601 (1933) (overruling *Macallen Co. v. Massachusetss*, 279 U.S. 620 (1929). *See also United States v. City of Detroit*, 355 U.S. 466, 472 n. 2 (1958)).

44. *Funk v. United States*, 290 U.S. 371, 373, 386 (1933) (overruling *Stein v. Bowman*, 13 Pet. (38 U.S.) 209 (1839) (in part); *Hendrix v. United States*, 219 U.S. 79 (1911); *Logan v. United States*, 144 U.S. 263 (1892); *Jim Fuey Moy v. United States*, 254 U.S. 189 (1920)).

45. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (overruling *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); *Morehead v. N.Y. ex rel. Tipaldo*, 298 U.S. 587 (1936)).

46. *R.R. Comm. v. Pacific Gas Co.*, 302 U.S. 388 (1938) (rehearing) (overruling *Railroad Commission v. Pacific Gas Co.*, 301 U.S. 669 (1937) (not recorded)).

47. *Helvering v. Producers Corp.*, 303 U.S. 376 (1938) (overruling *Gillespie v. Oklahoma*, 257 U.S. 501 (1922); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393 (1932)).

48. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 69, 79 (1938) (overruling *Swift v. Tyson*, 16 Pet. (41 U.S.) 1 (1842)).

49. *Graves v. N.Y. ex rel. O'Keefe*, 306 U.S. 466 (1939) (overruling *Dobbins v. Erie County*, 16 Pet. (41 U.S.) 435 (1842); *Collector v. Day*, 11 Wall. (78 U.S.) 113 (1871); N.Y. ex rel. *Rogers v. Graves*, 299 U.S. 401 (1937); *Brush v. Commissioners*, 300 U.S. 352 (1937)).

50. *Rochester Tel. Corp. v. United States*, 307 U.S. 125 (1939) (overruling *Proctor & Gamble v. United States*, 225 U.S. 282 (1912)).

51. *O'Malley v. Woodrough*, 307 U.S. 277 (1939) (overruling *Evans v. Gore*, 253 U.S. 245 (1920)).

52. *Madden v. Kentucky*, 309 U.S. 83 (1940) (overruling *Colgate v. Harvey*, 296 U.S. 404 (1935)).

53. *Helvering v. Hallock*, 309 U.S. 106 (1940) (overruling *Helvering v. St. Louis Trust Co.*, 296 U.S. 39 (1935); *Becker v. St. Louis Trust Co.*, 296 U.S. 48 (1935)).

54. *Tigner v. Texas*, 310 U.S. 141 (1940) (overruling *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540 (1902)).

55. *United States v. Darby*, 312 U.S. 100 (1941) (overruling *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (limited)).

56. *United States v. Chicago, M.St. P. & P.R. Co.*, 312 U.S. 592 (1941) (overruling *United States v. Lynch*, 188 U.S. 445 (1903) (in part); *United States v. Heyward*, 250 U.S. 633 (1919) (not recorded)).

57. *Nye v. United States*, 313 U.S. 33 (1941) (overruling *Toldeo Newspaper Co. v. United States*, 247 U.S. 401 (1918)).

58. *California v. Thompson*, 313 U.S 109 (1941) (overruling *Di Santo v. Pennsylvania*, 273 U.S. 34 (1927)).

59. *United States v. Classic*, 313 U.S 299 (1941) (overruling *Newberry v. United States*, 256 U.S. 232 (1921)).

60. *Olsen v. Nebraska*, 313 U.S. 236 (1941) (overruling *Ribnik v. McBride*, 277 U.S. 250 (1928)).

61. *Alabama v. King & Boozer*, 314 U.S. 1 (1941) (overruling *Panhandle Oil Co. v. Knox*, 277 U.S. 219 (1928); *Graves v. Texas Company*, 298 U.S. 393 (1936)).

62. *Toucey v. N.Y. Life Ins. Co.*, 314 U.S. 118 (1941) (overruling *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921)).

63. *Edwards v. California*, 314 U.S. 160 (1941) (overruling *City of New York v. Miln*, 11 Pet. (36 U.S.) 103 (1837)).

64. *State Tax Comm. v. Aldrich*, 316 U.S. 174 (1942) (overruling *First National Bank v. Maine*, 284 U.S. 312 (1932)).

65. *Williams v. North Carolina*, 318 U.S. 287 (1942) (overruling *Haddock v. Haddock*, 201 U.S. 562 (1906)).

66. *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575 (1943) (overruling *Johnson v. Fleet Corporation*, 280 U.S. 320 (1930)).

67. *Jones v. Opelika*, 319 U.S. 103 (1943) (re-argument); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (overruling *Jones v. Opelika*, 316 U.S. 584 (1942)).

68. *Oklahoma Tax Comm. v. United States*, 319 U.S. 598 (1943) (overruling *Childers v. Beaver*, 270 U.S. 555 (1926)).

69. *Board of Education v. Barnette*, 319 U.S. 624 (1943) (overruling *Minersville District v. Gobitis*, 310 U.S. 586 (1940)).

70. *FPC v. Hope Gas Co.*, 320 U.S. 591 (1944) (overruling *United Railways v. West*, 280 U.S. 234 (1930 (in part)).

71. *Mercoid Corp. v. Mid-Continent Co.*, 320 U.S. 661 (1944) (overruling *Leeds & Catlin Co. v. Victor Talk. Mach. (no. 2)*, 213 U.S. 325 (1909) (limited)).

72. *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944) (overruling *Plamals v. Pinar Del Rio*, 277 U.S. 151 (1928) (in part)).

73. *Smith v. Allwright*, 321 U.S. 649 (1944) (overruling *Grovey v. Townsend*, 295 U.S. 45 (1935)).

74. *United States v. Southeastern Underwriters' Assn.*, 322 U.S. 533 (1944) (overruling *Paul v. Virginia*, 8 Wall. (75 U.S.) 168 (1869); *United States v. Schwimmer*, 279 U.S. 644 (1929)).

75. *Girouard v. United States*, 328 U.S. 61 (1946) (overruling *United States v. MacIntosh*, 283 U.S. 605 (1931); *United Stats v. Bland*, 283 U.S. 636 (1931)).

76. *Halliburton Co. v. Walker*, 3298 U.S. 1 (1946) (rehearing) (overruling *Halliburton Co. v. Walker*, 326 U.S. 696 (1946)).

77. *MacGregor v. Westinghouse Co.*, 329 U.S. 402 (1947) (rehearing) (overruling *MacGregor v. Westinghouse Co.*, 327 U.S. 758 (1946)).

78. *Angel v. Buelington*, 330 U.S. 183 (1947) (overruling *David Lupton's Sons v. Auto. Club of Am.*, 225 U.S. 489 (1912) (rendered obsolete by prior change in law)).

79. *Zap v. United States*, 330 U.S. 800 (1947) (rehearing) (overruling *Zap v. United States*, 328 U.S. 624 (1946)).

80. *Thibaut v. Car and General Ins. Corp.*, 332 U.S. 828 (1947) (on rehearing) (overruling *Thibaut v. Car and General Ins. Corp.*, 332 U.S 751 (1947)).

81. *Sherrer v. Sherrer*, 334 U.S. 343 (1948) (overruling *Andrews v. Andrews*, 188 U.S. 14 (1908) (in part)).

82. *Lincoln Federal Labor Union v. Northwestern*, 335 U.S. 525 (1949) (overruling *Adair v. United States*, 208 U.S. 161 (1908)) *See also Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941) (overruling *Coppage v. Kansas*, 236 U.S. 1 (1915)).

83. *Comr. v. Estate of Church*, 335 U.S. 632, 637 (1949) (overruling *May v. Heiner*, 281 U.S. 238 (1930)).

84. *Ott v. Mississippi Barge Line*, 336 U.S. 169 (1949) (overruling *St. Louis v. Ferry Company*, 11 Wall. (78 U.S.) 423 (1870); *Old Dominian Steamship Co. v. Virginia*, 198 U.S. 299 (1905); *Ayer & Lord Co. v. Kentucky*, 202 U.S. 409 (1906)).

85. *Oklahoma Tax Comm. v. Texas Co.*, 336 U.S. 342 (1949) (overruling *Choctaw & Gulf R.R. v. Harrison*, 235 U.S. 292 (1914); *Indian Oil Co. v. Oklahoma*, 240 U.S. 522 (1916); *Howard v. Gipsy Oil Co.*, 247 U.S. 503 (1918); *Large Oil Co. v Howard*, 248 U.S. 549 (1919); *Oklahoma v. Barnsdall Corp.*, 296 U.S. 521 (1936)).

86. *Cosmopolitan Co. v. McAllister*, 336 U.S. 783 (1949) (overruling *Hust v. Moore-McCormack Lines*, 328 U.S. 707 (1946)).

87. *United States v. Rabinowitz*, 339 U.S. 56, 66, 85 (1950) (overruling *Trupiano v. United States*, 334 U.S. 699 (1948); *McDonald v. United States*, 335 U.S. 451 1948)).

88. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (overruling *Mutual Film Corp. v. Ohio Indus'l Comm.*, 236 U.S. 230 (1915)).

89. *Brown v. Board of Education*, 347 U.S. 483, 491, 494-495 (1954) (overruling *Cumming v. Board of Education*, 175 U.S. 528 (1899); *Gong Lum v. Rice*, 275 U.S. 78 (1927)).

90. *In re Disbarment of Isserman*, 348 U.S. 1 (1954) (on rehearing) (overruling *In re Isserman*, 345 U.S. 286 (1953)).

91. *Gayle v. Browder*, 352 U.S. 903 (1956) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

92. *Reid v. Covert*, 354 U.S. 1 (1957) (overruling *Kinsella v. Krueger*, 351 U.S. 470 (1956); *Reid v. Covert*, 351 U.S. 487 (1956)).

93. *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 419 (1957) (overruling *Thompson v. Thompson*, 226 U.S. 551 (1913)). *See also Armstrong v. Armstrong*, 350 U.S. 568, 581 (1956)).

94. *Ladner v. United States*, 358 &U.S. 169 (1958) (rehearing) (overruling *Ladner v. United States*, 355 U.S. 282 (1958)).

95. *United States v. Raines*, 362 U.S. 17, 27 (1960) (overruling *United States v. Reese*, 92 U.S. 214, 220-221 (1876)).

96. *Elkins v. United States*, 364 U.S. 206, 210, 212-213, 283 (1960); *Rios v. United States*, 364 U.S. 253 (1960) (overruling *Weeks v. United States*, 282 U.S. 386, 398 (1914) (in part); *Center v. United States*, 267 U.S. 575 (1925); *Byars v. United States*, 273 U.S. 28, 33 (1927) (in part); *Feldman v. United States*, 322 U.S. 487, 492 (1944) (in part)).

97. *James v. United States*, 366 U.S. 213, 215, 221, 223, 241 (1961) (overruling *CIR v. Wilcox*, 327 U.S. 404 (1946)).

98. *Mapp v. Ohio*, 367 U.S. 643, 653-655 (1961) (overruling *Wolf v. Colorado*, 338 U.S. 25 (1949) (in part)); *See also Ker v. California*, 374 U.S. 23, 45, 53, 59 (1963) (overruling *Irving v. California*, 347 U.S. 128 (1954) (in part)).

99. *Baker v. Carr*, 369 U.S. 186, 277, 280 (1962) (overruling *Colegrove v. Green*, 328 U.S. 549 (1946) (in part)).

100. *Wesberry v. Sanders*, 376 U.S. 1 (1964) (overruling *Colegrove v. Barrett*, 330 U.S. 804 (1947)).

101. *Smith v. Evening News Assn.*, 371 U.S. 195, 199 (1962) (overruling *Westinghouse Employees v. Westinghouse Corp.*, 348 U.S. 437 (1955) (in part)). *See also Truck Drivers Union v. Riss & Co.*, 372 U.S. 517, 520 (1963).

102. *Construction Laborers v. Curry*, 371 U.S. 542, 552, 554 (1963) (overruling *Building Union v. Ledbetter Co.*, 344 U.S. 178 (1952) (in part)).

103. *Gideon v. Wainwright*, 372 U.S. 335, (1963) (overruling *Betts v. Brady*, 316 U.S. 455 (1942)).

104. *Gray v. Sanders*, 372 U.S. 368, 383 (1963) (overruling *Cook v. Fortson, Turman v. Duckworth*, 329, U.S. 675 (1946); *South v. Peters*, 339 U.S. 276 (1950); *Cox v. Peters*, 342 U.S. 936 (1952); *Hartsfeld v. Sloan*, 357 U.S. 916 (1958)).

105. *Fay v. Noia*, 372 U.S. 391, 435 (1963) (overruling *Darr v. Burford*, 339 U.S. 200 (1950) (in part)).

106. *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963) (overruling *Adams v. Tanner*, 244 U.S. 590 (1917)).

107. *Schneider v. Rusk*, 377 U.S. 163 (1964) (overruling *Mackenzie v. Hare*, 239 U.S. 299 (1915)).

108. *Malloy v. Hogan*, 378 U.S. 1, 6 (1964) (overruling *Twining v. New Jersey*, 311 U.S. 78 (1908); *Adamson v. California*, 332, U.S. 46 (1947)).

109. *Murphy v. Waterfront Comm.*, 378 U.S. 52, 57, 77 (1964) (overruling *Jack v. Kansas*, 199 U.S. 372 (1905); *United States v. Murdock*, 284 U.S. 141 (1931); *Feldman v. United States*, 322 U.S. 487 (1944); *Knapp v. Schweitzer*, 357 U.S. 371 (1958); *Mills v. Louisiana*, 360 U.S. 230 (1959)).

110. *Jackson v. Denno*, 378 U.S. 368, 391 (1964) (overruling *Stein v. New York*, 346 U.S. 156 (1953)).

111. *Escobedo v. Illinois*, 378, U.S. 478, 491-492 (1964) (overruling *Crooker v. California*, 357 U.S. 433 (1958); *Cicenia v. LaGay*, 357 U.S. 504 (1958)).

112. *Pointer v. Texas*, 380 U.S. 400, 406 (1965) (overruling *West v. Louisiana*, 194 U.S. 258 (1904)).

113. *Gold v. DiCarlo*, 380 U.S. 520 (1965) (overruling *Tyson & Bro. v. Banton*, 273 U.s. 418 (1927)).

114. *Swift & Co. v Wickham*, 382 U.S. 111 (1965) (overruling *Kesler v. Dept of Public Safety*, 369 U.S. 153 (1962)).

115. *Harris v. United States*, 382 U.S. 162 (1965) (overruling *Brown v. United States*, 359 U.S. 41 (1959)).

116. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (overruling *Breedlov v. Suttles*, 302 U.S. 277 (1937); *Butler v. Thompson*, 341 U.S. 937 (1951)).

117. *Spevack v. Klein*, 385 U.S. 511 (1967) (overruling *Cohen v. Hurley*, 366 U.S. 177 (1961)).

118. *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (overruling *Adler v. Board of Education*, 342 U.S. 485 (1952)).

119. *Afroyim v. Rusk*, 387 U.S. 253 (1967) (overruling *Perez v. Brownell*, 356 U.S. 44 (1958)).

120. *Warden v. Hayden*, 387 U.S. 294 (1967) (overruling *Gouled v. United States*, 255 U.S. 298 (1921)).

121. *Camara v. Municipal Court*, 387 U.S. 523 (1967) (overruling *Frank v. Maryland*, 359 U.S. 360 (1959)).

122. *Berger v. New York*, 388 U.S. 41 (1967) (overruling *Olmstead v. United States*, 277 U.S. 437 (1928) (in part)).

123. *Katz v. United States*, 389 U.S. 347 (1967) (overruling *Olmstead v. United States*, 277 U.S. 438 (1928)).

124. *Peyton v. Rowe*, 391 U.S. 54 (1968) (overruling *McNally v. Hill*, 293 U.S. 131 (1934)).

125. *Bruton v. United States*, 391 U.S. 123 (1968) (overruling *Delli Paoli v. United States*, 352 U.S. 232 (1957)).

126. *Duncan v. Louisiana*, 391 U.S. 145 (1968) (overruling *Maxwell v. Dow*, 176 U.S. 581 (1900)).

127. *Carafax v. LaVallee*, 391 U.S. 234 (1968) (overruling *Parker v. Ellis*, 362 U.S. 574 (1960)).

128. *Lee v. Florida*, 392 U.S. 378 (1968) (overruling *Schwartz v. Texas*, 344 U.s. 199 (1952)).

129. *Jones v. Alfred H. Mayer Co.*, 382 U.S. 409, 441-443 (1968) (overruling *Hodges v. United States*, 203 U.S. 1 (1906)).

130. *Moore v. Ogilvie*, 394 U.S. 814 (1969) (overruling *MacDougall v. Green*, 335 U.S. 281 (1948)).

131. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (overruling *Whitney v. California*, 274 U.S. 357 (1927)).

132. *Chimel v. California*, 395 (U.S. 752 (1969) (overruling *Harris v. United States*, 331 U.S. 145 (1947); United *States v. Rabinowitz*, 339 U.S. 56 (1950)).

133. *Benton v. Maryland*, 395 U.S. 784 (1969) (overruling *Palko v. Connecticut*, 302 U.S. 319 (1967)).

134. *Ashe v. Swenson*, 397 U.S. 436 (1970) (overruling *Hoog v. New Jersey*, 356 U.S. 464 (1958)).

135. *Boys Markets v. Retail Clerks Union*, 398 U.S. 235 (1970) (overruling *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962)).

136. *Prince v. Georgia*, 398 U.S. 323, 329-330 (1970) (overruling *Brantley v. Georgia*, 217 U.S. 284 (1910)).

137. *Moragne v. States Marine Lines*, 398 U.S. 375 (1970) (overruling *The Harrisburg*, 119 U.S. 199 (1886)).

138. *Williams v. Florida*, 399 U.S. 78 (1970) (overruling in part *Thompson v. Utah*, (170 U.S.) 343 (1898), *Rassmussen v. United States*, 197 U.S. 516 (1905)).

139. *Blonder-Tongue Labs v. Univ. of Ill. Foundation*, 402 U.S. 313 (1971) (overruling *Triplett v. Lowell*, 297 U.S. 638 (1936)).

140. *Andrews v. L. & N.R. Co.*, 406 U.S. 320 (1972) (overruling *Moore v. Ill. Cent. R. Co.*, 312 U.S. 630 (1941)).

141. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974) (overruling in part *Fuentes v. Shevin*, 407 U.S. 67 (1972)).

142. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (overrulling *Northwestern Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1907); *Western Turf Asssociation v. Greenberg*, 204 U.S. 359, 363; *See also Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925)).

143. *Perez v. Campbell*, 402 U.S. 637, 91 S.Ct. 1704, 29 L.Ed.2d 233 (1971) (overruling *Kesler v. Dept of Public Safety*, 369 U.S. 153, 82 S.Ct. 807, 7 L.Ed.2d 641 (1962)).

144. *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972) (overruling *Pope v. Williams*, 193 U.S. 621, 24 S.Ct. 573, 48 L.Ed. 817 (1904)).

145. *Lehnkausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 93 S.Ct. 1001, 35 L.Ed.2d 351 (1973) (overruling *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, 48 S.Ct. 553, 72 L.Ed. 927 (1928)).

146. *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) (overruling *A book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General*, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1

(1966)).

147. *North Dakota Pharmacy Board v. Snyder's Drug Stores*, 414 U.S. 156, 94 S.Ct. 407, 38 L.Ed.2d 379 (1973) (overruling *Liggett Co. v. Baldridge*, 278 U.S. 105, 49 S.Ct. 57, 73, L.Ed. 204 (1929)).

148. *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974) (overruling *Shapiro v. Thompson*, 394 U.S. 6128, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) (in part)).

149. *State Dept. of Health & Rehabilitative Services v. Zarate*, 407 U.S. 918, 92 S.Ct. 2462, 32 L.Ed.2d 803 (1972); and *Sterrett v. Mothers' & Children's Rights Organization*, 409 U.S. 809, 93 S.Ct. 68, 34 L.Ed.2d 70 (1972):

150. *Taylor v. Louisiana*, 419 U.S. 522, 95 S.t. 692, 42 L.Ed.2d 690 (1975) (overruling *Hoyt v. Florida*, 368 U.S. 57, 82 S.Ct. 159, 7 L.Ed.21d 118 (1961) (in effect)).

151. *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 96 S.Ct. 535, 46 L.Ed.2d 495 (1976) (overruling *Low v. Austin*, 13 Wall. 29, 20 L.Ed. 517 (1872)).

152. *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) (overruling *Valentine v. Chrestensen*, 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262 (1942)).

153. *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976) (overruling *Maryland v. Wirtz*, 392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968)).

154. *New Orleans v.Dukes*, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976) (overruling *Morey v. Doud*, 354 u.S. 457, 77 S.Ct. 1344, 1 L.Ed.2d 1485 (1957);

155. *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976) (overruling *Goesaert v. Cleary*, 335 U.S. 464,

69 S.Ct. 197, 92 L.Ed. 163 (1948);

156. *Complete Auto Transit v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977) (overruling *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, 71 S.Ct. 508, 95 L.Ed. 573 (1951);

157. *Schaeffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977) (overruling *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565 (1878)).

158. *Dept. of Revenue of Washington v. Washington Stevedoring Cos.*, 435 U.S. 734, 98 S.Ct. 1388, 55 L.Ed.2ds 682 (1978) (overruling *Puget Sound Stevedoring Co. v. State Tax Commn.*, 302 U.S. 90, 58 S.Ct. 72, 82, L.Ed. 68 (1937)).

159. *United States v. Scott*, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978) (overruling *United States v. Jenkins*, 420 U.S. 358, 95 S. Ct. 1006, 43 L.Ed.2d 250 (1975)).

160. *Hughes v. Oklahoma*, 441 U.S. 322, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979) (overruling *Geer v. Connecticut*, 161 U.S. 519, 16 S.Ct. 600, 40 L.Ed.793 (1896)).

161. *United States v. Salvucci*, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980) (overruling *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960)).

162. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 101 S.Ct. 2946, 69 L.Ed.2d 884 (1981) (overruling *Heisler v. Thomas Colliery Co.*, 260 U.S. 245, 43 S.Ct. 83, 67 L.Ed. 237 (1922)).

163. *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) (overruling *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964)).

164. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984) (overruling *Rolston v. Missouri Fund Comm'rs.*, 120 U.S. 390, 7 S.Ct.

499, 30 L.Ed. 721 (1887) (in part)).

165. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 104 S.Ct. 1099, 79 L.Ed.2d 361 (1984) (overruling *Coffey v. United States*, 116 U.S. 436, 6 S.Ct. 437, 29 L.Ed. 684 (1886)).

166. *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (overruling *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976)).

167. *United States v. Miller*, 471 U.S. 130, 105 S.Ct. 1811, 85 L.Ed.2d 99 (1985) (overruling in part *Ex parte Bain*, 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887)).

168. *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986) (overruling *Parratt v. Taylor*, 451 U.S. 527, 1010 S.Ct. 1908, 68 L.Ed.2d 420 (1981) (in part)).

169. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1868) (overruling *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965) (in part)).

170. *Solorio v. United States*, 483 U.S. 435, 107 S.Ct. 2924, 97 L.Ed.2d364 (1987) (overruling *O'Callahan v. Parker*, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969)).

171. *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987) (overruling *Parden v. Terminal Railway of Alabama Docks Dept.*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964)(in part)).

172. *South Carolina v. Baker*, 485 U.S. 505, 108 S.Ct. 1355, 99 L.Ed.2d 592 (1988) (overruling *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 15 S.Ct. 673, 39 L.Ed. 759 (1895)).

173. *Thornburgh v. Abbott*, 490 U.S. 401, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989) (overruling *Procunier v. Martinez*, 416

U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974) (in part)).

174. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, ___ U.S. ___, 112 S.Ct. 2791, 2823 (1992) (overruling *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S.; at 762, 106 S.Ct. at 2179 and Akron I, 462 U.S. 416, 103 S.Ct. 2481.

## APPENDIX B

### REPRESENTATIVE SCIENTIFIC AUTHORITIES WHICH CONCUR THAT LIFE BEGINS AT CONCEPTION

1. Audesirk, G.; and Audesink, T. *Biology: Life on Earth*. 2nd ed. New York: Macmillian Publishing Company, 1989.

   "A single lucky sperm may succeed in fertilizing it, starting the development of a new human being." p. 587

   "Fertilization occurs as the haploid nuclei of sperm and egg fuse, forming a diploid nucleus that contains all the genes of a new human being." p. 588

2. Nelson, G.E. *Biological Principles with Human Applications* 3rd ed. New York: John Wiley & Sons, 1989.

   "Since the parents differed genetically from each other, the zygote contains the genetic blueprint, so to speak, for a unique individual." p. 247

   "Whatever the number of genes, there are obviously enough to direct the formation of the whole human animal from a fertilized egg ... ." p. 288

   "An additional source of variation arises when a sperm and an egg unite. This recombination of a genetic materials adds to the pool of variation because no two eggs or sperm cells carry precisely the same genes. Therefore each recombination creates a unique individual." p. 288

3. Jennett, S. *Human Physiology*. New York: Churchill Livingstone, 1989.

   "The life of an individual begins at conception, the fertilization of an ovum by a spermatozoon." p. 409

4. Moore, K. *Before We Are Born* 3rd ed. Philadelphia: W.B. Saunders Company, 1989.

"Human development begins at fertilization when a male gamete or sperm fuses with a female gamete or ovum to form a zygote. The zygote is the first cell of a new human being." p. 25

"The male and female pronuclei fuse and the maternal and paternal chromosomes intermingle. The new diploid cell is called a zygote. It is the primordium of a human being." pp. 25-26

"Fusion of the two haploid gametes or germ cells (each with 23 chromosomes) produces a zygote, which is a diploid cell with 46 chromosomes, the normal number for the human species." p. 26

"Because half the chromosomes in the zygote come from the mother and the other half from the father, the zygote contains a new combination of chromosomes that differs from that of either of the parents. Consequently, fertilization forms the basis of biparental inheritance and ensures variation of the human species." p. 26

"The embryos chromosomal sex is determined at fertilization by the kind of sperm that fertilizes the ovum." p. 28

"Hence, it is the father rather than the mother whose gamete determines the sex of the embryo." p. 28

"Fertilization of the ovum by a sperm also initiates early human development by stimulating the zygote to undergo mitotic cell division or cleavage into two cells called blastomeres." p. 28

"Fertilization of the ovum usually occurs in the ampulla of the uterine tube. The process is complete when the haploid male and female pronuclei of the sperm and ovum, respectively, fuse to form a zygote. This diploid cell is the beginning of a new human being." p. 31

5. Thibodeau, G.A.; and Anthony, C.P. *Structure and Function of the Body* 8th ed. St. Louis: Times Mirror/Mosby College Publishers, 1988.

"The science of the development of the individual before birth is called embryology. It is a story of miracles, describing the means by which a new human life is started and the steps by which a single microscopic cell is transformed into a complex human being." pp. 409-410

"Genetically the zygote is complete. It represents a new single celled individual."

6. Thibodeau, G. *Anatomy and Physiology*. St. Louis: Times Mirror/Mosby College Publishing, 1987.

"Half of the 46 chromosomes in the zygote nucleus have come from the sperm and half from the ovum. Since chromosomes are composed of genes, the new being inherits half of its genes and the characteristics they determine from its father and half from its mother. Genetically, the zygote is complete. Time and nourishment are all that is needed for expression of those characteristics such as sex, body build, and skin color that were determined at fertilization." p. __

7. Scarr, S.; Weinberg, R.A.; and Levine A. *Understanding Development*. Harcourt Brace Jovanovich, Inc., 1986.

"The development of a new human being begins when a male's sperm pierces the cell membrane of a female's ovum, or egg." p. 86

"The villi become the placenta, which will nourish the developing infant for the next eight and a half months." p. 86

8. Craig, G. *Human Development* 4th ed. Englewood Cliffs, NJ: Prentice-Hall, 1986.

"Human development begins at the moment of conception." p. 57

"Here, we will look at the process of fertilization that marks the beginning of the life cycle of a human being." p. 57

9. Schuster, S.h.; and Asburn, S.S. *The Process of Human Development: A Holistic Life-Span Approach* 2nd ed. Boston: Little, Brown, and Company, 1986.

"Each individual begins life as a single cell that is formed by the union of two gametes - a sperm and an ovum (egg)." p. 50

"Characteristics are inherited according to specific laws, and the possibility of their occurrence in a new individual can be predicted." p. 58-59

10. Crouch, J.E. *Functional Human Anatomy* 4th ed. Philadelphia: Lea & Febiger, 1985.

"Development is a continuous process from conception (the fertilization of the ovum) to the death of the individual. For purposes of discussion, human development may be divided into two periods, prenatal development or embryology and postnatal development." p. 31

11. Gilbert, S.F. *Development Biology*. Sunderland, MA: Sinauer Associates, Inc., 1985.

"Fertilization is the process whereby two sex cells (gametes) fuse together to create a new individual with genetic potentials derived from both parents." p. 32

12. Clark, J. ed. *The Nervous System: Circuits of Communication In The Human Body*. Torstar Books, Inc., 1985.

"Each human begins life as a combination of two cells, a female ovum and a much smaller male sperm. This tiny unit, no bigger than a period on this page, contains all the

information needed to enable it to grow into the complex structure of the human body. The mother has only to provide nutrition and protection." p. 99

13. Clark, J.; ed. *Growth and Development: The Span of Life In The Human Body*. Torstar Books, Inc., 1985.

"... [T]here is absolutely no doubt at all that the story of the growth and development of a single being has its beginning at conception. This is the instant when a sperm from a human male enters and unites with an egg from a human female. The conceptual 'act of union' sets in motion a train of events of growth and development that only ends - perhaps more than a century later - when life itself ends." p. 9

"Fertilization brings together two sets of chromosomal material, one half the genetic blue print from the father, one half the genetic blueprint from the mother. Sperm and egg composition is so programmed that each sperm contains half the total gene complement of the father, each egg half that of the mother. This ensures that when egg and sperm fuse, a full complement of chromosomes exist in the newly fertilized egg. From this a new individual grows, ... ." pp. 9-10

14. Clark, J.; ed. *Genetics and Heredity: The Blueprints of Life*, In *The Human Body*. Torstar Books, Inc., 1985.

"You are unique because the combination of your genes is unique, and nobody has exactly the same combination (even if you are an identical twin - although between such twins there are only subtle differences). Genes provide the fundamental information that determines how a person develops, although environmental acts to shape the final product form the moment of conception onward."

15. Turner, J.S.; and Helms, D.B. *Lifespan Developmental* 2nd ed. CBS College Publishing (Hold, Rinehart, and Winston), 1983.

"Yet far more remarkable than the birth itself is the process whereby a single fertilized egg develops into a fully functioning infant - complete with arms, legs, nose, eyes, ears, internal organs, and an individuality all of its own. The key to this magnificent story is a special code contained in the nucleus of a cell. This code, unique and different for every individual, is just now becoming understood by scientists." p. 52

"Each species of plant and animal and every individual within a species has a full set of directions locked inside its nucleus. This is what makes a mouse different from a bird, a flower different from a tree, and siblings different from each other." p. 52

"A zygote (a single fertilized egg cell) represents the onset of pregnancy and the genesis of a new life." p. 53

16. Volpe, E.P. *Biology and Human Concerns* 3rd ed. Dobuque, Iowa: Wm. C. Brown Company Publishers, 1983.

"Although the egg is many times greater in volume than the sperm, the two have equal potentialities as far as inheritance is concerned. The blueprints for traits are carried in the nucleus of each gamete (the mature sex cell - egg or sperm). The genetic characteristics of the future child are established at the time the sperm nucleus unites with the egg nucleus." p. 18

"The fertilized egg is genetically different from both parents, and one could contend that biological life commences at the moment of conception." p. 19

"The traits of an individual are largely determined by the genetic composition of the individual. A specific genetic code is locked into each cell of an individual of the very moment of the union of the sperm and egg nuclei." p. 20

17. Bernstein, R. and Bernstein, S. *Biology: The Study of Life*. New York: Harcourt Brace Jovanovick, Inc., 1982.

"The sets of genes carried by offspring produced by sexual reproduction differ from each other and from the sets carried by either parent." p. 544.

"Within 12 hours after sperm penetration the nuclei of the sperm and the egg fuse together, restoring the appropriate number of chromosomes for body cells. All of the genes that will determine the characteristics of the offspring are now present in a single nucleus, and the sex of the offspring is established." p. 584

18. Goldenring, J.M. *Development of the Fetal Brain*. 307 The New England Journal of Medicine 564(1982).

"I suggest that as physicians we should view human existence as a continuum from the first cell division of the fertilized ovum until the death of the last cell in the [human] organism." p. 564

19. Bryant, N.J. *Disputed Paternity*. New York: Brian C. Decker, a Division of Thieme-Stratton, Inc., 1980.

"The newly formed cell (which is known as a zygote) represents the beginning of life."

20. Mussen, P.H.; Conger, J.J.; and Kagan, J. *Child Development and Personality* 5th ed. New York: Harper & Row, 1979.

"The life of each individual begins when a sperm cell from the father penetrates the wall of an ovum, or egg, from the mother." p. 52

"Life begins at conception. But what of the forces that, throughout the individual's existence, will influence his or her development? When do they begin? The answer, again, is at conception. At the moment that the tiny tadpole-shaped sperm penetrates the wall of the ovum, it releases 23 minute particles called chromosomes. At approximately the same time, the nucleus, the inner core of the ovum, breaks up, releasing 23 chromosomes of its

own." pp. 52-53

"This process is of great interest to us because it has been established through painstaking research that these chromosomes, which are further subdivided into even smaller particles called genes, are the carriers of the child's heredity. All the child's biological heritage from the father and mother is contained in these 46 chromosomes." p. 53

21. Parker, S. *Life Before Birth: The Story of the First Nine Months*. Cambridge: Cambridge University press, 1979.

"The fertilized egg is smaller than a pinhead, but inside it, in the chromosomes, are all the instructions and information needed for a new human being to develop." p. 8

"The egg cell nucleus also releases its chromosomes, and both sets line up in the middle of the cell. This is the moment of fertilization, when a new life comes into being." p. 12 (emphasis added)

22. Harlock, E.B. *Child Development* 6th ed. McGraw-Hill, Inc., 1978.

"Life begins at the moment of conception - the time when a female reproductive cell, the ovum (plural, ova), is fertilized by a male reproductive cell, the spermatozoon (plural, spermatozoa)." p. 51

"The first important condition occurring at the time of conception, when the ovum is fertilized by the spermatozoon, is the determination of the newly created individual's hereditary endowment. When the sperm unites with the ovum, everything the newly conceived individual will ever inherit from parents, grandparents, and other more remote ancestors is set." p 53

"After conception, nothing can be done to add to, or subtract from, the individual's hereditary endowment." p 54

23. Strand, F.L. *Physiology: A Regulatory Systems Approach*. New York: Macmillan Publishing Company, Inc., 1978. "The instant of fusion of the sperm nucleus with that of the ovum initiates a fascinatingly complex series of reactions which ultimately are designed to bring to full development an individual of the same species as the parents, bearing all the characteristics of his progenitors but individually different in a multitude of small ways. At this important instant, the genetic sex has also been determined." p. 542

"The cell has formed a new, mature individual, and we have come full cycle." p. 542

24. Fitzgerald, H.E.; Strommen, E.A.; and McKinney, J.P. *Developmental Psychology: The Infant and Young Child.* Homewood, IL: The Dorsey Press, 1977.

"In the normal human being, each cell is diploid, which means that it contains pairs of chromosomes - 23 pairs, or a total of 46 chromosomes." ... "Each parent contributes one half of the chromosomes complement to the new organism." p. 26

"During meiosis two phenomena occur which effectively guarantee that the new individual will be genetically unique. One of the phenomena, crossing-over, occurs when the chromosomes pair up. The other, segregation, occurs when the chromosomes begin to separate." p. 26

25. Pikunas, J. *Human Development: An Emergent Science*. McGraw-Hill, Inc., 1976.

"The union of ovum and sperm nuclei defines the hereditary endowment." p. 111

"The development of the child begins at conception, about nine months before birth." p. 111

26. Mader, S.S. *Inquiry into Life*. Dobuque, Iowa: Wm. C. Brown Company Publishers, 1976.

"Each gamete, you'll recall, contains the haploid number of chromosomes, and the fertilized egg, or zygote, contains the diploid number of chromosomes as the new individual now begins development." p. 433 (emphasis added)

27. Sussman, L.N. *Paternity Testing By Blood Grouping*. Springfield, IL: Charles C. Thomas Publisher, 1976.

"A complete cell called a zygote with its normal complement of twenty-three pairs of chromosomes is formed and a new somatic cell series - thus a new individual - begins."

28. Munsinger, H. *Fundamentals of Child Development* 2nd ed. New York: Holt, Rinehart, and Winston, Inc., 1975.
"Human life begins at Conception." p. 4

"Human life begins when one of many available sperm from a male succeeds in penetrating the wall of an ovum (egg) inside the female. The combination of material from the two parents, which determines what characteristics the new individual will inherit, begins a complicated sequence of development which will one day produce a mature human adult." p. 4

"Mendel assumed that a full set of genes comes from each parent as part of the fertilized egg (the zygote). This double set of genes is the genotype, the hereditary make up of the new individual." p. 42

29. Bernard, H.W. *Human Development in Western Culture* 4th ed. Boston: Allyn & Bacon, Inc., 1975.

"The life of a given individual begins when the sperm (male cell) penetrates the ovum (female cell)." p. 37

"Whatever biological potential is received from parents crosses this narrow hereditary bridge at the moment of conception." p. 40

30. Anthony C.P.; and Kolthoff, N.J. *Textbook of Anatomy and Physiology* 9th ed. St. Louis: the C.V. Mosby Company, 1975.

"The sperm head then forms itself into a nucleus that approaches and eventually fuses with the nucleus of the ovum, producing, at that moment, a new single-celled individual or zygote. Half of the 46 chromosomes in the zygote nucleus have come from the sperm and half from the ovum. Since chromosomes are composed of genes, the new being inherits half of its genes and the characteristics they determine from its father and half from its mother." p. 500

31. Goin, C.J.; and Goin, O.B. *Man and the Natural World* 2nd ed. New York: Macmillan Publishing Co., Inc., 1975.

"It is the resultant zygote that, by repeated mitotic cell divisions, will give rise to the adult of the next generation. This one of the most amazing facts of biology - that a single cell, by dividing and dividing and dividing again, can give rise to sometimes billions of cells of many different kinds and yet so precisely arranged that the resultant organism is not only a smoothly functioning individual but an individual of the same kind as the parent." p. 183

32. Lugo, J.O.; and Hershey, G.L. *Human Development: A Multi-Disciplinary Approach to the Psychology of Individual Growth*. New York: Macmillan Publishing Co., Inc., 1974.

"The growth of every human being begins with a special cell, the fertilized ovum. Although the diameter of the ovum is approximately 1/175 of an inch and its weight is about one 20-millionth of an ounce, all the genetic potentialities for the complete development of a human being are contained within it. From this microscopically small cell, a baby composed of about 200 billion cells of different kinds will develop during the next nine months. This striking phenomenon of growth is common in all human beings." p. 242

33. Kaluger, G.; and Kaluger, M. *Human Development: The Span of Life*. St. Louis: The C.V. Mosby Company, 1974.

"In that fraction of a second when the chromosomes form pairs, the sex of the new child will be determined, hereditary characteristics received from each parent will be set, and a new life will have begun." pp. 28-29

34. DeCoursey, R.M. *The Human Organism* 4th ed. McGraw-Hill, Inc., 1974.

"The zygote therefore contains a new arrangement of genes on the chromosomes never before duplicated in any other individual. The offspring destined to develop from the fertilized ovum will have a genetic constitution different from that of either parent and from anyone else in the world." p. 584

## APPENDIX C

### States Which Recognize That The Life Of A Human Being Begins At Conception

**Alabama:**

*Trent v. State*, 15 Ala. App. 485, 488, 73 So. 834, 836 (1916) (interpreting state abortion law) ("'does not the new being, from the first day of its uterine life, acquire a legal and moral status that entitles it to the same protection as that guaranteed to human beings in extrauterine life?'") (quoting from the 1911 Transactions of the Medical Association of Alabama)

*Wolfe v. Isbell*, 291 Ala. 327, 331, 280 So.2d 758, 761 (1973) (rejecting viability requirement in wrongful death action where death occurs after live birth):

> [T]he more recent authorities emphasize that there is no valid medical basis for a distinction based upon viability, especially where the child has been born alive. These [decisions] proceed on the premise that the fetus is just as much an independent being prior to viability as it is afterwards, and that from the moment of conception, the fetus or embryo is not a part of the mother, but rather has a separate existence within the body of the mother.

*Eich v. Town of Gulf Shores*, 293 Ala. 95, 98-99, 300 So. 2d 354, 356-57 (1974) (rejecting live birth requirement in wrongful death action) (stating that "the paramount purpose of our wrongful death statutes . . . is the preservation of human life" and holding that "it is illogical to allow liability to depend on whether death from fatal injury occurred before or after live birth")

Alabama Constitutional Convention Call (S.J. Res. 9, 1980 Ala. Acts 396):

> [A]pplies to the Congress . . . to call a convention for the sole and exclusive purpose of proposing an amendment to the Constitution that would protect

> the lives of all human beings including unborn children at every stage of their biological development and providing that neither the United States nor any state shall deprive any human being, from the moment of fertilization, of the right to life without due process of laws, nor shall any state deny any human being, from the moment of fertilization, the equal protection of the laws, except where pregnancy results from rape or incest; or where abortion is necessary to save the life of the mother; or where testing revealed abnormality or deformity of the fetus.

Arizona:

*Nelson v. Planned Parenthood Center of Tucson*, 19 Ariz. App. 142, 505 P.2d 580, 586 (1973) (construing state abortion law):

> One cannot gainsay a legislative determination that an embryonic or fetal organism is 'life.' Once begun, the inevitable result is a human being, barring prior termination of the pregnancy.

Ariz. Rev. State., sec. 13-1103(A)(5) (West 1989) (defining offense of manslaughter to include "[k]nowingly or recklessly causing the death of an unborn child at any stage of its development by any physical injury to the mother of such child which would be murder if the death of the mother had occurred")

**Arkansas:**

Ark. Const., Amend. 68, sec. 2 ("[t]he public policy of Arkansas is to protect the life of every unborn child from conception until birth, ....")

Arkansas Constitutional Convention Call (Res. of Feb. 17, 1977, H.R.J. Res. 2):

> Requests Congress to call a convention to propose a constitutional amendment which would provide that every human being subject to the jurisdiction of the United States or any state shall be deemed from the moment of fertilizaton to be a person and entitled to the right of life; provides that Congress and the states shall have concurrent powers to enforce such an amendment.

**California:**

Cal. Pen. Code, sec. 187(a) (West 1988) ("[m]urder is the unlawful killing of a human being, or a fetus, with malice aforethought")

Cal. Civ. Code, sec. 29 (West 1982) ("[a] child conceived but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the even of its subsequent birth")

*Scott v. McPheeters*, 33 Cal. App. 2d 629, 634, 92 P.2d 678, 681 (1939) (it is "an established and recognized fact by science and by everyone of understanding" that "an unborn child is a human being separate and distinct from its mother")

**Connecticut:**

Conn. Gen. Stat., Ann. sec. 53-31(a) (1985) ("[t]he public policy of the state and the intent of the legilatur is to protect and preserve human life from the moment of conception") (rep. by P.A. 90-113, sec. 4 (1990))

*Simon v. Mullin*, 34 Conn. Sup. 139, 147, 380 A.2d 1353, 1357 (1977) (rejecting viability requirement in wrongful death action where death occurs after live birth) ("[t]he development of the principle of law that now permits recovery by or on behalf of a chil dborn alive for prenatal injuries suffered at any time after conception, without regard to the viability of the fetus, is a notable illustration of the viability of our common law")

**Delaware:**

*Scott v. State*, 49 Del. 401, 409-10, 117 A.2d 831, 835-36 (1955) (characterizing abortion law as one which defines an offense against the lives and persons of individuals)

Delaware Constitutional Convention Call (Res. of May 23, 1978), H.R. Con. Res. 9):

> Requests Congress to call a convention to propse a constitutional amendment that would protect the lives of all human beings, including unborn children at every stage of their biological development.

**District of Columbia:**

*Bonbrest v. Kotz*, 65 F. Supp. 138, 140 (D. D.C. 1946) (recognizing cause of action for prenatal injuries) ("[f]rom the viewpoint of the civil law, and the law of property, a child en ventre sa mere is not only regarded as [a] human being, but as such from the moment of conception--which it is in fact")

*Greater Southeast Community Hosp. v. Wiliams*, 482 A.2d 394, 396 (D.C. Ct. App. 1984) (rejecting viability requiremetn in wrongful death action where death occurs after live birth) (referring to "established medical fact that a fetus is a person

separate from its mother")

**Florida**:

*Day v. Nationwide Mut. Ins. Co.*, 328 So.2d 560, 561 (1976) (rejecting viability requirement in case of prenatal injuries) (quoting with approval Prosser, Handbood of the Law of Torts, Sec. 55 at 336 (4th ed. 1971)):

> Viability of course does not affect the question of the legal existence of the foetus, and therefore of the defendant's duty; and it is a most unsatisfactory criterion, since it is a relative matter, depending upon the health of the mother and child and many other matters in addition to the stage of development. Certainly, the infant may be no less injured; and all logic is in favor of ignoring the stage at which it occurs.[1]

**Georgia**:

*Hornbuckle v. Plantation Pipe Line Co.*, 212 Ga. 504, 504-05, 93 S.E.2d 727, 728 (1956) (rejecting viability requirement in case of prenatal injuries) ("[i]f a child born after an injury sustained at any period of its prenatal life can prove the effect on it of a tort, it would have a right to recover") (one dissent characterized majority opinion as holding, in effect, "that an infant becomes a 'person' from the moment of conception, with the right to sue for a tortious injury after its birth"), id. at 506, 93 S.E.2d at 729.

[1] To which to the Fifth Edition of Prosser & Keaton (1984) adds: "With recent advances in embryology and medical technology, medical proof of causation in these cases has become increasingly reliable, which argues for eliminating the viability or other arbitrary developmental requirement altogether." Id. at 369.

*Morrow v. Scott*, 7 Ga. 535, 537 (1849) ("[i]n ... general, a child is to be considered as in being, from the time of its conception, where it will be for the benefit of such child to be so considered")

*Gulf Life Ins. Co. v. Brown*, 181 Ga. App. 72, 74, 351 S.E.2d 267, 269 (1986) ("unquestionably, Georgia cases show a clear tendency toward placing a high premium on human life and an unmistakable willingness to recognize a fetus as a person at a time prior to actual delivery")

Idaho:

*Nash v. Meyer*, 54 Idaho 283, 301, 31 P.2d 273, 280 (1934) (construing state abortion law) (criminal abortion statute intended "to discourage abortions because thereby the life of a human being, the unborn child, is taken")

*Blake v. Cruz*, 108 Idaho 253, 261, 698 P.2d 315, 323 (1984) (Bistline, J., concurring in part and dissenting in part) ("[t]his Court recently committed itself to the proposition that an unborn child is a person in being," citing ~~Volk v. Baldazoi~~, 103 Idaho 570, 651 P2d 11 (1982) (rejecting live birth requiremetn in wrongful death action where death occurs after viability))

Idaho Constitutional Convention Call (S. Con. Res. 132, 45th Legis. 2d Sess, 1980 Idaho Sess. Laws 1005):

> Request[]s that the Congress . . . call a constitutional convention for the specific and exclusive purpose of proposing an amendment . . . [to provide that]:
>
> (a) From the moment of conception a person shall be guaranteed all personal rights extended to all individuals under the constitution and laws of the United States of America and the state or states of residence and only under extreme circumstances shall it be otherwise, namesly to save the life of the mother, or other extenuating circumstances where at least two consulting physicians, one not having

previously been involved in the case, and after due and thorough consultation with all persons having the legal right to be involved, find it is necessary and just that the life of the unborn shall be terminated.

(b) Provide that the several states shall have the power to enforce such an amendment and establish priority of life by appropriate legislation.

**Illinois:**

*Ill. Ann. Stat.*, ch. 38, par. 81-21 (Smith-Hurd 1977) (preamble to Illinois Abortion Act of 1975):

> [T]he General Assembly of the State of Illinois do solemnly declare and find in reaffirmation of the longstanding policy of this State, that the unborn child is a human being from the moment of conception and is, therefore, a legal person, for purposes of the unborn child's right to life and is entitled to the right to life from conception under the laws and Constitution of this State . . . .

*Renslow v. Mennonite Hospital*, 67 Ill.2d 348, 352-53, 367 N.E.2d 1250, 1252-53 (1977) (rejecting viability requirement in cause of action for prenatal injuries)

Ill. Rev. Stat., ch. 70, par. 2.2 (1991) (amending wrongful death statute to allow wrongful death action to be brought on behalf of an unborn child without regard to the stage of pregnancy when the child is injured or whether there is a live birth)

Ill. Rev. Stat., ch. 38, par. 9-1.2(b)(1) (1991) (defining "unborn child" as "any individual of the human species from fertilization until birth")

Ill. Rev. Stat., ch. 38, pars. 9-1.2, 9-2.1, 9-3.2, 12-3.2, 12-4.4 (1991) (amending criminal code to define broad range of crimes, including homicide, that can be committed against unborn child, regardless of gestational age)

Indiana:

*Cheaney v. State*, 259 Ind. 138, 145, 285 N.E.2d 265, 268 (1972) (construing state abortion law) ("[i]t is now established that some sort of independent life begins at conception," rejecting quickening and viability as outdated and arbitrary distinctions)

*Cowe v. Forum Group, Inc.*, 541 N.E.2d 962, 967-68 (Ind. App. 1989), rev'd and remanded on other grounds, 575 N.E.2d 630 (Ind. 1991) (recognizing cause of action for prenatal injuries at any time after conception and rejecting viability requirement)

Kentucky:

Ky. Rev. Stat. Ann., sec. 311.710(5) (Michie/Bobbs-Merrill 1990):

> If . . . the United States constitution is amended or relevant judicial decisions are reversed or modified, the declared policy of this Commonwealth to recognize and to protect the lives of all human beings regardless of their degree of biological development shall be fully restored.

Ky. Rev. Stat. Ann., sec. 311.720(5), (6) (abortion regulations) (defining "fetus" as "a human being from fertilization until birth" and "human being" as "any member of the species homo sapiens from fertilization until death")

Kentucky Constitutional Convention Call (H.R. Res. 7, 1978 Gen. Assembly, Reg. Sess., 1978 Ky. Acts 1401):

> [R]equest[s] Congress . . . to call a convention for the sole purpose of proposing the following article as an amendment to the Constitution . . . :
>
> Section 1. With respect to the right to life, the word person as used in this article and in the Fifth and Fourteenth Articles of Amendment to this Constitution applies to all human beings irrespective of age, health, function, or condition of dependency,

including their unborn offspring at every stage of their biological development.

Section 2. No unborn person shall be deprived of life by any person, provided, however, that nothing in this article shall prohibit a law permitting only those medical procedures required to prevent the death of the mother.

Section 3. The Congress and the several states shall have the power to enforce this article by appropriate legislation.

Louisiana:

La. Stat. Ann., sec. 14.2(7) (West 1986) (defining "person" for purposes of criminal code to include "a human being from the moment of fertilization and implantation")

*Danos v. St. Pierre*, 383 So.2d 1019, 1027 (La. App.), aff'd, 402 So.2d 633 (La. 1991) (Lottinger, J., concurring):

> This definition [La. Stat. Ann., sec. 14.2(7) (West 1986)] added to the Criminal Code in 1976, reflects a legislative intent to classify an unborn child as a "person" for purposes of violent criminal conduct like homicide and battery. The definition reveals an express recognition by the legislature that life begins at the moment of conception and that this form of life can indeed be the victim of a harm, i.e., a murder or battery.

Sec. 1 of Acts 1991, No. 26 (amending state abortion law):

> It is declared to be the public policy of the state of Louisiana that it has a legitimate compelling interest in protecting, to the greatest extent possible, the life of the unborn from the time of conception until birth. We also affirm our belief that life begins at conception and that life thereafter is a continuum until the time of death.

*Johnson v. Southern New Orleans Light and Traction Co.*, Docket 9048 (La. App. Orl. Dec. 10, 1923) (rejecting live birth and viability requirements in cause of action for wrongful death) (quoted with approval in Danos v. St. Pierre, 402 So.2d 633, 639 (La. 1981)):

> The argument of the defendant is that the infant before it is born is not a child, not a human being, that it is only a thing, a part of the anatomy of the mother, as are her organs. We cannot accept that theory. We believe that the infant is a child from the moment of conception, although life may be in a state of suspended animation, the subject of love, affection and hope and that the injury or killing of it in its mother's womb is covered by the [wrongful death statute] and gives its bereaved parents to a right of action against the guilty parties for their grief and mental anguish.

Accord: *Valence v. La. Power & Light Co.*, 50 So.2d 847 (La. App. 1951) (wrongful death of two to four month old unborn child).

*Danos v. St. Pierre*, 383 So.2d 1019, 1027 (La. App.), aff'd 402 So.2d 633 (La. 1991) (rejecting live birth requirement in action for wrongful death of a viable unborn child) (Lottinger, J., concurring):

> Viability has not been the controlling factor in some previous Louisiana cases allowing recovery [for wrongful death of a stillborn child], and there is no need to make it a controlling factor in this decision. Just as live birth is an arbitrary cut off point for wrongful death purposes, viability is equally arbitrary in deciding whether the fetus is a "person" whose wrongful killing is compensable.

Louisiana Constitutional Convention Call (Res. of July 16, 1976, S. Con Res. 70):

> Requests Congress to call a convention to propose

> a constitutional amendment extending the term "person" in the Fifth and Fourteenth amendments to apply to all human beings "irrespective of age, health, function or condition of dependency, including unborn offspring at every stage of their biological development;" permits states to adopt laws necessary to preserve the woman's life; requests state legislative bodies to apply to Congress to call a convention to propose this constitutional amendment; grants Congress and the states the power to enforce the amendment.

**Maine**:

*Smith v. State*, 33 Me. 48, 57 (1851) (construing criminal abortion statue which abolished the quickening distinction):

> There is a removal of the unsubstantial distinction, that it is no offense to procure an abortion, before the mother becomes sensible of the motion of the child, notwithstanding it is then capable of inheriting an estate; and immediately afterwards is a great misdemeanor. It is now equally criminal to produce abortion before and after quickening. And the unsuccessful attempt to cause the destruction of an unborn child is a crime, whether the child be quick or not.

**Maryland**:

*Damasiewicz v. Gorsuch*, 197 Md. 417, 438, 79 A.2d 550, 559 (1951) (recognizing cause of action for prenatal injuries) ("from a medical point of view, a child is alive within the mother before the time arrives when it can live apart from her"), id. at 440, 79 A.2d at 560 (theory that "an unborn child is a part of the mother" is "an outworn point of view, now rejected by modern medicine")

*Group Health Ass'n v. Blumenthal*, 295 Md. 104, 119, 453 A.2d 1198, 1207 (1983) ("a cause of action lies for the wrongful death of a child born alive who dies as a result of injuries sustained

while en ventre sa mere") (rejecting viability requirement)

**Massachusetts**:

*Commonwealth v. Cass*, 392, Mass. 799, 801, 467 N.E. 2d 1324, 1325 (1984) (viable fetus is a "person" within meaning of vehicular homicide statute):

> In keeping with approved usage, and giving terms their ordinary meaning, the word "person" is synonymous with the term "human being." An offspring of human parents cannot reasonably be considered to be other than a human being, and therefore a person, first within, and then in the normal course outside, the womb . . . By the use of the term[] "person" . . . the Legislature has given no hint of a contemplated distinction between pre-born and born human beings.

*Torigan v. Watertown News Co.*, Inc., 352 Mass. 446, 449, 225 N.E.2d 926, 927 (1967) (rejecting viability requirement in wrongful death action where death follows live birth)

Massachusetts Constitutional Convention Call (Act of June 8, 1977, H.R. 5984):

> Requests Congress to call a convention to propose a constitutional amendment extending the term "person" in the Fifth and Fourteenth amendments to apply to all human beings "irrespective of age, health, function or condition of dependency, including unborn offspring at every stage of their biological development;" permits states to adopt laws necessary to preserve the woman's life; grants Congress and the states the power to enforce the amendment.

**Michigan**:

*Womack v. Buchhorn*, 384 Mich. 718, 725, 187 N.W.2d 218, xxx (1971) (recognizing cause of action for prenatal injuries

and rejecting viability requirement because "a child has a legal right to begin life with a sound mind and body")

O'Neil v. Morse, 385 Mich. 130, 188 N.W.2d 785 (1971) (recognizing cause of action for wrongful death of a viable stillborn child)

**Minnesota**:

Minn. Stat. Ann., secs. 609.266, 609.2661 through 609.2665, 609.267, 609.2671, 609.2672, 609.268 (1987 & 1992 Supp.) (amending criminal code to include a broad range of crimes, including homicide, that can be committed against an unborn child, regardless of gestational age)

*Verkennes v. Corniea*, 229 Minn. 365, 369, 38 N.W.2d 838, 840 (1940) (rejecting live birth requirement in wrongful death action) (quoting with approval federal district court opinion in *Bonbrest v. Kotz*, 65 F. Supp. 138, 140 (D. D.C. 1946), where court said "[f]rom the viewpoint of the civil law, and the law of property, a child en ventre sa mere is not only regarded as [a] human being, but as such from the moment of conception--which it is in fact")

**Missouri**:

Mo. Ann. Stat. sec. 1.205.1(1) (Vernon Supp. 1992) (preamble to Missouri Abortion Law) ("[t]he life of each human being begins at conception")

Mo. Ann. Stat., sec. 188.015(6) (Vernon Supp. 1992) (abortion regulations) (defining "unborn child" as "the offspring of human beings from the moment of conception until birth and at every stage of its biological development")

*Rodgers v. Danforth*, 486 S.W.2d 258, 259 (Mo. 1972) (construing criminal abortion law) (accepting stipulation that "unborn children have all the qualities and attributes of adult human persons differing only in age or maturity" and that "[m]edically, life is a continuum from conception to death")

*Steggall v. Morris*, 363 Mo. 1224, 1229-33, 258 S.W.2d 577, 579-81 (1953) (rejecting viability requirement in cause of action for prenatal injuries)

Missouri Constitutional Convention Call (Res. of Apr. 24, 1975, S. Con. Res. 7):

> Requests Congress to call a convention to propose a constitutional amendment extending the term "person" in the Fifth and Fourteenth amendments to apply to all human beings "irrespective of age, health, function, or condition of dependency, including unborn offspring at every stage of their biological development;" permits states to adopt laws necessary to preserve the woman's life; grants Congress and the states the power to enforce the amendment.

**Montana**:

Mont. Code Ann., sec. 50-20-102 (1991) (statement of legislative purpose and intent--abortion regulations):

> The legislature reaffirms the tradition of the state of Montana to protect every human life, whether unborn or aged, healthy or sick. In keeping with this tradition and in the spirit of our constitution, we reaffirm the intent to extent the protection of the laws of Montana in favor of all human life.

Mont. Code Ann., sec. 41-1-103 (1991) ("[a] child conceived but not yet born is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth")

**Nebraska**:

Neb. Rev. Stat. sec. 28-325 (1989) (legislative findings in statutes regulating abortion) (legislators "deplore the destruction of the unborn human lives which has and will occur . . . as a consequence of the United States Supreme Court's decision," and lament their inability "to protect the life, health, and welfare of

pregnant women and unborn human life")

*Hans v. State*, 147 Neb. 67, 72, 22 N.W.2d 385, 389 on rehearing, 147 Neb. 73, 25 N.W.2d 35 (1946) (statute defining offense of "foeticide" meant "the unlawful destruction of an unborn child, in ventre sa mere, at any stage of gestation")

Nebraska Constitutional Convention Call (Res. of Apr. 21, 1978, Legis. Res. 152):

> Legislature . . . petition[s] . . . Congress . . . to call a convention for the sole purpose of proposing the following article as an amendment to the Constitution of the United States . . .
>
> ARTICLE
>
> Section 1. With respect to the right to life, the word person as used in this article and in the Fifth and Fourteenth Articles of Amendment to this Constitution applies to all human beings irrespective of age, health, function, or condition of dependency, including their unborn offspring at every stage of their biological development.
>
> Section 2. No unborn child shall be deprived of life by any person, provided, however, that nothing in this article shall prohibit a law permitting only those medical procedures required to prevent the death of the mother.
>
> Section 3. The Congress and the several states shall have the power to enforce this article by appropriate legislation.

**Nevada**:

*White v. Yup*, 85 Nev. 527, 536-37, 458 P.2d 617, 623 (1969) (recognizing cause of action for prenatal injuries and for the wrongful death of a viable, stillborn child) (proposition that "[a]n unborn child is a part of its mother until birth and thus has no juridical existence" "has no scientific or medical basis in fact")

Nevada Constitutional Convention Call (S.J. Res. 27, 60th Legis., 1979 Nev. Stat. 2014):

> [L]egislature requests . . . Congress . . . to call a convention limited to proposing an amendment to the Constitution . . . to protect human life by restricting abortion [subject to exceptions in cases where the pregnancy results from rape or incest and where continuation of the pregnancy would seriously endanger the life of the mother].

**New Hampshire**:

*Bennett v. Hymers*, 101 N.H. 483, 485, 147 A.2d 108, 110 (1958) (rejecting viability requirement in cause of action for prenatal injuries) ("[w]e adopt the opinion that the fetus from the time of conception become a separate organism and remains so throughout its life")

*Wallace v. Wallace*, 120 N.H. 675, 679, 421 A.2d 134, 136 (1980) (wrongful death action) ("[t]o deny a nonviable fetus a [wrongful death] cause of action is not to deny that life begins with conception")

N.H. Rev. Stat. Ann., secs. 631:1, 631:2 (1991 Supp.) (amending criminal assault statutes to include physical injuries to pregnant woman resulting in miscarriage or stillbirth)

**New Jersey**:

*Smith v. Brennan*, 31 N.J. 353, 362, 157 A.2d 497, 502 (1960) (rejecting viability requirement in cause of action for prenatal injuries) ("[m]edical authorities have long recognized that

a child is in existence from the moment of conception, and not merely a part of its mother's body"):

> We see no reason for denying recovery for a prenatal injury because it occurred before the infant was capable of independent existence. In the first place, age is not the sole measure of determining in a borderline case whether or not a fetus was viable at the time of the injury, unless it was immediately born. Therefore, the viability rule is impossible of practical application . . . In addition, . . . medical authority recognizes that an unborn child is a distinct biological entity from the time of conception, and many branches of the law afford the unborn child protection throughout the period of gestation. The most important consideration, however, is that the viability distinction has no relevance to the injustice of denying recovery for harm which can be proved to have resulted from the wrongful act of another. Whether viable or not at the time of injury, the child sustains the same harm after birth, and therefore, should be given the same opportunity for redress.

Id. at 367, 157 A.2d at 504.

In *Smith v. Brennan*, the New Jersey Supreme Court quoted with approval Chief Justice Brogan's dissent in *Stemmer v. Kline*, 128 N.J.L. 455, 466, 26 A.2d 489, 687 (1942):

> While it is a fact that there is a close dependence by the unborn child on the organism of the mother, it is not disputed to-day that the mother and the child are two separate and distinct entities; that the unborn child has its own system of circulation of the blood separate and apart from the mother; that there is no communication between the two circulation systems; that the heart beat of the child is not in tune with that of the mother but is more rapid; that there is no dependence by the child on the mother except for sustenance. It might be

> remarked here that even after birth the child depends for sustenance upon the mother or upon a third party. It is not the fact that an unborn child is part of the mother, but that rather in the unborn state it lived with the mother, we might say, and from conception on developed its own distinct, separate personality.

*Giardina v. Bennett*, 111 N.J. 412, 545 A.2d 139 (1988) (granting to parents a common law cause of action where a physician negligently causes the pre-birth death of an infant)

*State v. Gedicke*, 43 N.J.L. 86, 89-90 (1881) (interpreting state abortion law) (state abortion law amended "to protect the life of the child also, and inflict the same punishment, in case of its death, as if the mother should die")

New Jersey Constitutional Convention Call (Act of Apr. 21, 1977, S. 1271):

> Requests Congress to call a convention to propose a constitutional amendment which would provide that every human being subject to the jurisdiction of the United States or any state shall be deemed from the moment of fertilization to be a person and entitled to the right to life; provides that Congress and the states shall have concurrent powers to enforce such an amendment.

**New York**:

*Kelly v. Gregory*, 282 A.D. 542, 543-44, 125 N.Y.S.2d 696, 697 (1953) (rejecting viability requirement in cause of action for prenatal injuries) ("legal separability should begin where there is biological separability" and "separability begins at conception"):

> The mother's biological contribution from conception on is nourishment and protection; but the foetus has become a separate organism and remains so throughout its life. That it may not live if its protection and nourishment are cut off earlier than

> the viable stage of its development is not to destroy its separability; it is rather to describe conditions under which life will not continue. Succeeding conditions, exist, of course, that have that result at every stage of its life, post-natal as well as pre-natal.

Id. at 544, 125 N.Y.S.2d at 697.

**North Carolina**:

*DiDonato v. Wortman*, 320 N.C. 423, 435, 358 S.E.2d 489, 496 (1987) (recognizing cause of action for wrongful death of a viable unborn child) ("[t]he public policy of this state as expressed by the legislature in our statutes recognizes that an unborn child is a person") (Martin, J., concurring in part and dissenting in part)

*Corkey v. Edwards*, 322 F. Supp. 1248, 1252 (W.D.N.C. 1971), vacated and remanded (construing criminal abortion statute):

> Apart, the sperm and the unfertilized egg will die; neither has the capacity to grow and develop independently as does the fertilized egg. During fertilization, sperm and egg pool their nucleii and chromosomes. Biologically, a living organism belonging to the species homo sapiens is created out of this organization. Genetically, the adult man was from such a beginning all that he essentially has become in every cell and human attribute.

**North Dakota**:

N.D. Cen. Code, secs. 12.7-17.1-02 through 12.1-17.1-06 (Supp. 1991) (amending criminal code to define broad range of crimes, including homicide, that can be committed against unborn child, regardless of gestational age)

*Hopkins v. McBane*, 359 N.W.2d 862, 865 (rejecting viability requirement in cause of action for prenatal injuries and live

birth requirement in wrongful death actions) ("it is commonly understood that an unborn child is a human being or person which has life and which, even prior to the process of birth, can experience death")

statute providing that "[a] child conceived but not born is to be deemed an existing person so far as may be necessary for its interests in the event of its subsequent birth" was intended "to ensure and to protect the interests of a child subsequent to its conception but prior to its birth"), id. 359 N.W. 2d at 864

Ohio:

*Steinberg v. Brown*, 321 F. Supp. 741, 746 (N.D. Ohio 1970) (construing criminal abortion law) (holding that human life is entitled to federal constitutional protection from conception) ("a new life comes into being with the union of human egg and sperm cells" and "such terms as 'quick' or 'viable', which are frequently encountered in legal discussion, are scientifically imprecise and without recognized meaning")

*Williams v. Marion Rapid Transmit*, 152 Ohio St. 114, 128-29, 39 Ohio Ops. 433, 439-40, 87 N.E.2d 334, 340 (1949) (recognizing cause of action for prenatal injuries):

> To hold that the plaintiff in this case [a viable unborn child] did not suffer an injury in her person would require this court to announce that as a matter of law the infant is part of the mother until birth and has no existence in law until that time. In our view such a ruling would deprive the infant of the right [to a remedy] conferred by the [Ohio] Constitution upon all persons, by the application of a time worn fiction not founded on fact and within common knowledge untrue and unjustified.

The court also quoted with approval Prosser on Torts (3d ed.) wherein Professor Prosser stated, "So far as duty is concerned, if existence at the time [of injury] is necessary, medical authority has recognized long since that the child is in existence from the moment of conception, and that for many purposes its

existence is recognized by the law." Id. at 127, 39 Ohio Ops. at 439, 87 N.E.2d at 339.

**Oklahoma**:

Okla. Stat. Ann., tit. 63, sec. 1-730(2) (1984) (abortion regulations) (defining "unborn child" as "the unborn offspring of human beings from the moment of conception, through pregnancy, and until live birth . . . ")

*Evans v. Olson*, 550 P.2d 924, 925 (1976) (rejecting viability requirement in cause of action for prenatal injuries and live birth requirement in wrongful death actions) ("there is no medical or scientific basis" for the proposition that "[a]n unborn child has no juridical existence apart from its mother")

**Oregon**:

*State v. Ausplun*, 86 Or. 121, 131-132, 167 P. 1019, 1022-23 (1917) (construing criminal abortion law):

> The statute refers to "any woman pregnant with a child" without reference to the stage of pregnancy. When a virile spermatozoon unites with a fertile ovum in the uterus, conception is accomplished. Pregnancy at once ensues, and under normal circumstances continues until parturition. During all this time the woman is "pregnant with a child" within the meaning of the statute. She cannot be pregnant with anything else than a child. From the moment of conception a new life has begun, and is protected by the enactment. The product of conception during its entire course is imbued with life, and is capable of being destroyed as contemplated by the law. By such destruction the death of a child is produced and often that of its mother as well.

*Mallison v. Pomeroy*, 205 Or. 690, 696-97, 291 P.2d 225, 228 (1955) (recognizing cause of action for prenatal injuries) ("[i]n Oregon we have recognized by statute the separate entity of an

unborn child by protecting him in his property rights and against criminal conduct, and we can see no logical reason why a viable child should not be protected for injuries sustained through the tortious acts of another")

*Libbee v. Permanente Clinic*, 268 Or. 258, 518 P.2d 636, 520 P.2d 361 (1974) (recognizing cause of action for the wrongful death of a viable stillborn child)

Pennsylvania:

Pa. Cons. Stat. Ann., tit. 18, sec. 3203 (Purdon's 1992 Supp.) (abortion regulations) (defining "unborn child" and "fetus" as "an individual organism of the species homo sapiens from fertilization until live birth")

*Amadio v. Levin*, 509 Pa. 199, 204, 501 A.2d 1085, 1087 (1985) (rejecting both viability and live birth requirements in wrongful death actions) ("a child en ventre sa mere is a separate individual from the moment of conception")

*Sinkler v. Kneale*, 401 Pa. 267, 273, 164 A.2d 93, 96 (1960) (rejecting viability requirement in cause of action for prenatal injuries) (viability "has little to do with the basis right to recover, when the foetus is regarded as having existence as a separate creature form the moment of conception")

Pennsylvania Constitutional Convention Call (H.R. 71, 1978 Gen. Assembly, 1978 Pa. Laws 1431):

> [A]pplication to the Congress . . . to call a convention for drafting and proposing an amendment to the Constitution . . . to guarantee the right to life to the unborn fetus by doing the following:
>
> (a) With respect to the right to life guaranteed in the United States Constitution, provide that every human being subject o the jurisdiction of the United States or any state shall be deemed from the moment of fertilization to be a

person and entitled to the right to life.

(b) Provide that Congress and the several states shall have concurrent powers to enforce such an amendment by appropriate legislation.

* * *

(d) Nothing in this article shall prohibit a law permitting only those medical procedures required to prevent the death of the mother.

**Rhode Island**:

R.I. Gen. Laws, sec. 11-3-4 (1981) (1973 R.I. Pub. Laws 68-70, ch. 15, sec. 2) (criminal abortion statute):

> It shall be conclusively presumed in any action concerning the construction, application or validity or sec. 11-3-1 [prohibiting abortion] that human life commences at the instant of conception and that said human life at said instant of conception is a person within the language and meaning of the fourteenth amendment of the Constitution . . .

*Sylvia v. Gobeille*, 101 R.I. 76, 79, 220 A.2d 222, 223-24 (1966) (rejecting viability requirement in cause of action for prenatal injuries) (noting "the medical fact that a fetus becomes a living human being from the moment of conception" and rejecting viability as a "decisive criterion" because "there is no sound reason for drawing a line at the precise moment of the fetal development when the child attains the capability of an independent existence")

*Presley v. Newport Hospital*, 117 R.I. 177, 183, 365 A.2d 748, 751 (1976) (rejecting live birth requirement in wrongful death of a viable unborn child) (citing with approval the civil law proposition that "from the moment of conception a separate organism comes into existence" and the medical proposition that "an ovum, once it is fertilized, is a separate living entity"):

> [V]iability is a concept bearing no relation to the attempts of the law to provide remedies for civil wrongs. If we profess allegiance to reason, it would be seditious to adopt so arbitrary and uncertain a concept as viability as a dividing line between those persons who shall enjoy the protection of our remedial laws and those who shall become, for most intents and purposes, nonentities. If it seems that if live birth is to be characterized, as is so frequently has been, as an arbitrary line of demarcation, then viability, when enlisted to serve that same purpose, is a veritable non sequitur.

Id. at 188, 365 A.2d at 753-54 (dicta in plurality opinion).

Rhode Island Constitutional Convention Call (Act of Apr. 21, 1977, H.R. 5150):

> Requests Congress to call a convention to propose a constitutional amendment which would provide that every human being subject to the jurisdiction of the United States or any state shall be deemed from the moment of fertilization to be a person and entitled to the right to life; provides that Congress and the states shall have concurrent power to enforce such an amendment.

South Dakota:

*State v. Munson*, 86 S.D. 663, 669, 201 N.W.2d 123, 126 (1972), vacated and remanded, 410 U.S. 950 (1973) (construing criminal abortion law) (citing with approval holding in *Steinberg v. Brown*, 321 F. Supp. 7431 (D. Ohio 1970), that human life is entitled to federal constitutional protection from conception)

S.D. Codified Laws Ann., sec. 21-5-1 (1987) (amending wrongful death statute to include "an unborn child" without regard to gestational age)

S.D. Codified Laws Ann., sec. 22-17-6 (1988) ("[a]ny person who intentionally kills a human fetus by causing an injury

to its mother is guilty of a Class 4 felony")

S.D. Codified Laws Ann., sec. 26-1-2 (1992) ("[a] child conceived, but not born, is to be deemed an existing person so far as may be necessary for its interests in the event of its subsequent birth")

Texas:

*Thompson v. State*, 493 S.W.2d 913, 918 (Tex. Crim. App. 1971) vacated and remanded, 410 U.S. 950 (1973) (construing criminal abortion law):

> The State of Texas is committed to preserving the lives of its citizens so that no citizen "shall be deprived of life . . . except by the due course of the law of the land." [Citation omitted]. [The Texas abortion law] is designed to protect fetal life . . . and this justifies prohibiting termination of the life of the fetus or embryo except for the purpose of saving the life of the mother.

*Leal v. C.C. Pitts Sand and Gravel, Inc.*, 419 S.W.2d 820, 822 (Tex. 1967) (recognizing cause of action for wrongful death for prenatal injuries where death occurs after live birth), rev'g 413 S.W.2d 825 (Tex. Civ. App. 1967) (denying cause of action) and app'g dissenting opinion of Justice Cadena, 413 S.W. 2d at 828 ("medical science . . . consider[s] that life begins at conception"), id. at 829 ("legalistic concept that the unborn child is but a part of its mother" is "contrary to scientific fact and comon sense")

*Witty v. Am. Gen. Capital Dist., Inc.*, 727 S.W.2d 503, 505 (Tex. 1987) (denying cause of action for wrongful death of viable child who was stillborn but recognizing "the fetus as having an existence separate from its mother")

*Yandell v. Delgago, 468 S.W.2d 475 (Tex. Civ. App. 1971)* (rejecting viability requirement in cause of action for prenatal injuries), writ ref'd n.r.e. per curiam, 471 S.W.2d 569 (Tex. 1971)

**Utah**:

Utah Code Ann., sec. 76-7-301.1(1) (1992) (preamble to Utah abortion law):

> It is the finding and policy of the Legislature, reflecting and reasserting the provisions of Article I, Section 1 and 7, Utah Constitution, which recognize that life founded on inherent and inalienable rights is entitled to protection of law and due process; and that unborn children have inherent and inalienable rights that are entitled to protection by the state of Utah pursuant to the provisions of the Utah Constitution.

Sec. 76-7-301.1(2):

> The state of Utah has a compelling interest in the protection of the lives of its unborn children.

Sec. 76070301.1(3):

> It is the intent of the Legislature to protect and guarantee to unborn children their inherent and inalienable right to life as required by Article I, Sections 1 and 7, Utah Constitution.

Utah Code Ann., sec. 76-5-201(1) (1992 Supp.) (defining offense of criminal homicide as causing "the death of another human being, including an unborn child")

Utah Constitutional Convention Call (H.R.J. Res. 28, 42nd Legis., Reg. Sess., 1977 utah Laws 1317, 1318):

> Requests Congress to call a convention for the purpose of drafting and submitting for ratification by the states, an amendment to the Constitution that will guarantee to every human life, from the moment of fertilization throughout its natural existence, in every state, territory, and possession of the United States, the full protection of all laws respecting life,

> expecting an unborn child whose mother's life would otherwise be lost.

**Virginia**:

*Kalafult v. Gruver*, 239 Va. 278, 283-84, 389 S.E.2d 681, 683-84 (1990) (rejecting viability rule in cause of action for prenatal injuries or for wrongful death following live birth) (noting "developments in medical science, especially in the field of embryology," court held that "an action may be maintained for recovery of damages for any injury occurring after conception, provided the tortious conduct and the proximate cause of the harm can be established")

**Wisconsin**:

Wis. Stat. Ann., sec, 940.04(6) (West 1982) (criminal abortion statute defining "unborn child" as "a human being from the time of conception until it is born alive")

*Puhl v. Milwaukee Auto Ins. Co.*, 8 Wis.2d 343, 356, 99 N.W.2d 163, 170 (1959) (rejecting viability requirement in cause of action for prenatal injuries):

> The viability theory has been challenged as unrealistic in that it draws an arbitrary line between viability and non-viability and fails to recognize the biological fact that there is a living human being before viability. A child is no more a part of its mother before it becomes viable than it is after viability. It would be more accurate to say that the fetus from conception lives within its mother rather than as a part of her. The claim of a child injured before viability is just as meritorious as that of a child injured during the viable stage.

*Kwaterski v. State Farm Mut. Auto Ins. Co.*, 34 Wis.2d 14, 21, 148 N.W.2d 107, 111 (1966) (rejecting born alive requirement in wrongful death actions) (assertion that "[a] child has not juridical existence apart from its mother" has "no scientific or medical basis in fact")

## APPENDIX D

### 18th Century British Common Law Which Considered The Child as a Person Before Birth

The 18th Century British Common Law, both the courts of law and of equity, held the child *en ventre sa mere* to be a person. A review of the case law demonstrates that in 18th Century Britain: (a) the courts reasoned from the fact that such child is a person, as it is *en ventre sa mere*, to the application of law and equity to that child; (b) the Equity courts, in this instance, learnt their equity (i.e. what was natural justice) as much from principles of law as from its own rulings; (c) courts sitting in civil cases learnt from the principles of criminal law recognizing the child before birth; and (d) the live birth of the child served to provide proof of what was the case during his or gestation - i.e. that the child was a person in existence at the relevant time during gestation, the gender of the child if pertinent, and that the child was indeed alive in utero at the time when the injuries, observable at birth and of what the child then died, were inflicted by the accused charged with the child's murder.

In *Beale v. Beale*, (1713) 1 P. Wms. 244 (24 ER 373) (England), Harcourt LC reasoned from the regard for the child *en*

*ventre sa mere* at law (i.e. before the courts of law as distinct to equity) to what a court of equity should do:

> As to the other objection, it would be very hard in a court of equity, that a child, because it happened not to be born at such a time, must, therefore, be unprovided for, but as the law in many respects, regards an infant in *ventre sa mere*, so as to allow such child to be vouched (1 Inst. 390); also as the mother may be guilty of the murder of the child in *ventre sa mere*, if she takes poison with an intent to poison it, and the child is born alive, and afterwards dies of that poison (3 Inst. 50, 51): so there is more reason that equity should consider such child, in order to its being *provided for*; and therefore this posthumous child may be well looked upon, in equity, to be *living at her father's death* in *ventre sa mere*. (at 246, underling added)

In *Burdet v. Hopegood*, 1718 1 P. Wms. 486 (24 ER 484) (England), where a testator died leaving his wife *ensient* with a son, the plaintiff Sir Robert Burdet, it was nevertheless objected that "the testator had died leaving a son at the time of his death". The report records:

> Hereupon Lord Chancellor *Parker* referred [the question] to the judges of the King's Bench, who were unanimously of opinion, that the plaintiff Sir *Robert* though not born, had yet an existence in the eye of the law, as in *ventre sa mere*, which in many respects was regarded: as if a woman takes poison to kill her child then in her womb, and the child is born alive, and afterwards dies of that poison, the woman is guilty of murder (vide *Beale v. Beale*, ante, 244); also a child in *ventre sa mere* may be vouched, and may be a devisee, and it would be

> hard to disinherit such an only child, nor could it be imagined the testator ever intended to so to do. (underlining added)

With this the Lord Chancellor agreed, and gave judgment for the plaintiff. To meet the objection, the judges of the King's Bench reasoned from the fact that the plaintiff was in existence when a child *en ventre sa mere*, as recognised by the courts of law, of which they gave a number of instances, notably, the criminal law: they concluded that the testator's intention embraced this son in existence at his death. It was only the *proof* of this which was briefly delayed. No fiction or straining of language was involved in arriving at the result.

In *Thellusson v. Woodford* (1805) 11 Ves. Jun. 112 (32 ER 1030) (England), the House of Lords was asked on appeal to determine the following objection, as to why the testator's Will was said to infringe the rule against perpetuities:

> The second objection, which has been made in this case is, that the testator has added to the lives of persons in being at the time of his decease those of persons not then born. (at 138; 1040)

This related to twin grandsons of the testator *en ventre* at his death: they were defendants in the action (4 Ves. 237; ER 122) (England). It was to their detriment if they were held to be

persons in being at the testator's death, because if they were not they could eventually be entitled to the accumulated property, applying the doctrine of *Cy pres* (as noted in argument, 4 Ves. 298; ER 152) (England).

Lord Chief Baron Macdonald, delivering the unanimous opinion of the Judges, first held that by the words "born in due time afterwards" the testator was referring to the period of gestation, and mean, "...such children of the several persons named as their respective mothers were *ensient* with at the time of his death" (at 138-139; 1041). Then, in dismissing this as a ground of objection to the Will, he applied a number of cases recognizing the existence of the child *en ventre sa mere* (at 139; 1041): in particular, the *Beale* and *Burdet* cases noted above, and also the following cases recognising that the child *en ventre sa mere* is a person in reality, to all intents and purposes - -

> In *Wallis v. Hodgson* [sic] (2 Atk. 117) (England) Lord Hardwicke held, that a posthumous child was entitled under the Statute of Distributions; and his reason deserves notice. 'The principal reason (says he) that I go upon, is, that the Plaintiff was *en ventre sa mere* at the time of her brother's death, and consequently a person *in rerum nutura* [sic, *natura*]; so that by the rules of the Common and Civil Law she was, to all intents and purposes, a child, as much as if born in the father's lifetime," ...In *Doe v. Lancashire* (5 Term Rep. 49) (England),

> the Court of King's Bench has held, that marriage and the birth of a posthumous child revoke a Will, in like manner as if the child had been born in the life-time of the father. In *Doe v. Clarke* (2 H. Black. 399) (England) Lord Chief Justice Eyre holds, that independent of intention an infant *en ventre sa mere* by the course and order of nature is then living; and comes clearly within the description of a child living at the parent's decease; and he professes not to accede to the distinction between the cases, in which a provision has been made for children generally, and where the testator has been supposed to mark a personal affection for children, who happen to be actually born at the time of his death. The most recent case is that of *Long v. Blackall* (3 Ves. 486; 7 Term Rep. 100) (England). There the Court of King's Bench had no doubt, that a devise to a child *en ventre sa mere* in the first instance was good, and a limitation over was good also, ... . (at 139-141; 1041, underlining added).

Because the child *en ventre sa mere* is a person in being, Lord Chief Baron Macdonald held that such child was a life that could postpone vesting (at 141; 1042), and that at the time of the vesting of the estate at the end of the period of accumulation, a child *en ventre sa mere* is entitled to take (142ff; 1042).

Lord Hardwicke supported his ruling in *Wallis v. Hodson* (1740) 2 Atk. 114 (26 ER 472) (England), noted above, by listing principles of the Common Law showing regard for children *en ventre sa mere* as persons in divers instances:

> First, as to the common law, there is the trite case of an infant *en ventre sa mere* being vouched in a

> common recovery; a mother also may justify the detaining of charters on behalf of it; a devise to him is good, by the opinion of *Treby* and *Powell*, in *Scatterwood* and *Edge*, 1 *Salk*. 229, a bill may be brought in his behalf, and this court will grant an injunction in his favor to stay waste, 2 *Vern*. 710, *Musgrave versus Parry*, et al. (at 117; 473)

At first instance in *Thellusson v. Woodford* (1798) 4 Ves. Jun. 227 (31 ER 117) (England), it is similarly objected: "That a devise for the life of a child *en ventre sa mere* is void" (at 320; 162). In answer to this, Buller J applied the same passage from Lord *Hardwicke* in *Wallis v. Hodson* on which the House of Lords also relied, and then continued:

> In the same case [*Wallis v. Hodson*] Lord *Hardwicke* takes notice, that the Civil Law confines the rule to cases, where it is for the benefit of the child to be considered as born: but notwithstanding he states the rule to be, that such is to be considered living to all intents and purposes.
>
> ...
>
> ... In *Doe v. Clarke*, the words 'that wherever such consideration would be for his benefit, a child *en ventre* sa mere shall be considered as absolutely born' were used by me, because I found them in the Book, from whence the passage was taken. But there is no reason for so confining the rule. Why should not children *en ventre sa mere* be considered generally as in existence? They are entitled to all the privileges of other persons. In this case it is enough to say, such a child is capable of having an estate given to him, and consequently to another person for his life. The infant is not hurt, nor is the

> Law transgressed, by giving the interest to a third person any more than by giving it to the infant himself.
>
> ...
>
> *Goodtitle v. Wood* (7 Term Rep. B.R. 103, note) (England) is an authority to the same point. The effect is, that there is no difference between a child actually born and a child *en ventre sa mere*. In *Lancashire v. Lancashire* Judge Grose says, 'I know of no argument founded on law and natural justice, in favor of the child, who is born during his father's life, that does not equally extend to a posthumous child, ... " (at 322-324; 163-164, underling added)

Her Majesty's Attorney-General, a respondent, was of like mind: he submitted to the House of Lords, "The whole foundation for the argument, that such children are to be considered as in being for their own benefit only, rests upon some words which some Reporters of Decisions have ascribed to Judges, when delivering their opinions upon claims made by such children. But these words, if they were used in those cases, by no means negative the proposition, that such children are in being for all purposes. There is no reason for confining the rule. They are entitled to the privileges of all persons; and it is reasonable, that they should be the means of conferring privileges upon other persons. But the law considers such children as being in cases, in which they may be prejudiced. They may be vouched in a

recovery (Co. Lit. 390a); though such voucher is for the purpose of making them answerable over in value. They may be executors." (11 Ves. Jun. 112, 129-130; 1037).

In the result, determining the case "according to the rules of Law and Equity", Lord Eldon (HL) affirmed the judgment at first instance. (150-151; 1045).

That Chancery and the King's Bench were *ad idem* that an infant *en ventre sa mere* was a life in being, as apparent from the references in the case to the history of *Long v. Blackall* before those two Courts. (4 Ves. 227, 341-343; 11 Ves. 112, 150) That the Court of Common Pleas was of the same mind, appears from the ruling of Eyre LCJ in *Doe v. Clarke* (1795) 2 H.Bl. 399 (126 ER 617) (England) noted by the House of Lords (see quotation above).

The reasoning in the several quotations set out above grounded the property rights of a child *en ventre sa mere* in his reality as a person in being. Even more so should the child's existence justify his or her life being protected by others, before and after birth, giving rise to a defence in a criminal case. In fact, as *Beale v. Beale* (1713) and *Burdet v. Hopegood* (1718) show, it was apparent to the court from the criminal law that the child *en* ventre sa mere is a living person. It is equally apparent, too, from

the fact that such child has a right not to be injured, for there is a duty of care to him or her: *Watt v. Rams* [1972] VR 353 (England); *Lynch v. Lynch* [1991] Aust Tors Reports ¶81-117 (SCt), affirmed (1991) 25 NSWLR 411 (CA) (England). Intentionally injury would be a trespass. [If the child cannot sue until birth, that appears to be a procedural bar: *Watt*, 376 lines 1-6; *Lynch* (SCt), page 69,096 (2nd para.)]

The rule in *Burdet v. Hopegood* and other cases said Loughborough LC in *Thellusson v. Woodford* (1798) 4 Ves. Jun. 227-342 (England), "is according to every principle of justice and natural feeling." These same principles equally justify the application of the justification of defence of others in respect to infants *en ventre sa mere*.

Two later House of Lords cases do not affect the result in *Thellusson* or its reasoning from the substantive fact that the child *ensient* is a person in being, nor the substantive principles of law or equity relating to the child *en ventre sa mere* cited in that case:

(1) *Villar v. Gilbey* [1907] AC 139 (HL) (England) re-asserted as a rule of construction that the word "born" is construed to include an unborn child only where that construction is necessary for its benefit. Counsel for the appellant expressly

noted, "It is necessary to distinguish between cases of construction proper and cases in which a principle of law is involved." (at 139-140) Lord Loreburn LC noted (at 144) some of the principles of substantive law relating to the child *en ventre sa mere*, such as the law's solicitude for the child and that it can be a party to proceedings (which Lord Hardwicke noted in *Wallis v. Hodson*), before he turned to the matter of construction in that case. At 149, Lord Atkinson briefly distinguished *Thellusson* as relating to the rule against perpetuities, but did not disturb its substantive reasoning or the result.

(2) *Elliot v. Lord Joicy* [1935] AC 209 HL (England) also involved a question of construction relating to a posthumous child (he was held not to come within the intention of the testatrix as appearing from her Will). *Thellusson* was again distinguished as relating to perpetuity only and having "nothing to do with any question of construction analogous to the question now in issue" (at 220 middle); a dictum of Lord Eldon relating to construction was qualified in its effect so that the rule of construction for the benefit of posthumous child did not apply where the benefit were only of an indirect kind (at 228-229, read with 220-221). Lord MacMillan, after noting that English and Scots law on the question

of interpretation where a posthumous child is concerned was the same (at 236-237), accepted the following learned statement of Scots law as accurate:

> the doctrine of the Civil Law which has long been received into our system of jurisprudence, that a child born after the period at which the vesting of a right falls to be determined, but proved by the period to its birth to have been in utero at that time, is entitled to the rights of an existing period from the period of its conception. ... (239, underlining added)

In other words birth serves, not to change the child's status from non-entity to person, but as *proof* of the child's existence in utero, with the entitlement to "the rights of an existing person from the period of its conception." CF. In re *Wilmer's Trusts* [1903] 1 Ch. 874, 880-883; [1903] 2 Ch. 411 (CA), 417-421, (England) where what became known at birth was "related back" as proof of that being the fact also during gestation: the child *ensient* at the testatrix's death turned out to be a son when born - "here we must treat it as the actual fact that there was a third son in existence prior to the death of the testatrix" (at 421, CA). He was thus a relevant life for the rule against perpetuities - in *Thellusson* the gender of the twins *ensient* at the testator's death was immaterial.

In *Thellusson*, the court reasoned from the fact that the child *ensient* is a person in existence to establish that the principles of law relating to perpetuities were not offended by holding such child to be a life in being at the testator's death. Because *Thellusson* involved a principle of law, it went further than the rule of construction involved in the *Villar* and *Elliot* cases: its recognition of the child during gestation was "to all intents and purposes", in fact it was to the prejudice of the twins in that case. [Likewise, *In re Wilmer's Trusts* [1903] 2 Ch. 411 (CA) (England), 421, per Romer LJ] That there are other principles of law which also apply to a child *ensient* for his or her benefit or prejudice, indeed, rights or liabilities, was noted in the quotations from *Thellusson* and the earlier cases given above.

In a recent Scotish case, *McWilliams v. Lord Fraser of Carmyllie* (28 July 1992) (England), Lord Morton of Shuna refused to apply *Elliot v. Lord Joicey* to a negligence claim where the parents were suing for damages for the death of their child who was injured in utero then born alive and died.

The defender had conceded that during the period Martin was alive there was, assuming fault, a liability to pay damages to Martin for his pre-natal injuries, but this concession was limited to

the child's right of action being dependent on the legal fiction that, "in all matters affecting its interests, the unborn child in utero should be deemed to be already born", described by Lord MacMillan in *Elliot v Joicey* (at 238). The defender limited his concession to that fiction because, in applying this rule of construction in that case, Lord MacMillan said that "According to the law of Scotland, a child in utero is fictionally deemed to be already born only when the result of applying the fiction is to benefit the child when actually born, and that the fiction cannot be invoked in the interests of any third party." The defender argued that, for this reason, the parents as third parties had no claim. (pp. 3-4)

Lord Morton rejected this reliance on *Elliot* because he accepted the view of the Scottish Law Commission that there was a duty of care to a child in the womb (p.6), and that a child born alive with injuries could recover under the principles of negligence (pp.6-10): he held that this is "the law of Scotland both before and after the passage of the Damages (Scotland) Act" (p.10). Returning to the legal fiction referred to by Lord McMillan in *Elliot v. Joicey*, he considered some case law and concluded:

For these reasons I consider that it is not necessary

> to rely on the 'legal fiction' to give a child who is born alive a title to sue for injuries sustained in utero and that if a child dies after being born alive and the death is cause by injuries sustained in utero the parents of that child have a title to sue for damages for the death of that child. I shall accordingly repel the defender's plea to the relevancy [of the claim]. - (p.13)

Lord Morton was right in principle to refuse to allow the rule of construction in *Elliot* to excuse a defendant where liability turned, not on any legal fiction, but on substantive issues such as the duty of care towards another.

VV.

## QUOTATIONS CONCERNING THE CLASS OF HUMAN BEINGS WHO POSSESS NATURAL AND INALIENABLE RIGHTS TO LIFE

1. In a speech reflecting upon the Fred Scott decision in Springfield, Illinois on June 26, 1857, Abraham Lincoln, in criticizing Chief Justice Roger Taney's acknowledgement that the Declaration of Independence was broad enough to include "the whole human family," but failed to implement the principles therein encompassed, explained the principle J.M. exposes:

"They (the founding fathers) meant simply to declare the right (to life, liberty and happiness) so that the enforcement of it might follow as fast as circumstances should permit. They meant to set up a standard for free society, which should be familiar to all, and revered by all, constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and the happiness and value of life to all people of all colors everywhere. The assertion that 'all mean are created equal...' was placed in the Declaration, not for [separation from Britain], but for future use." Lincoln on Democracy, "A Standard Maximum for Free Society," (June 16, 1857), p. 90, 91

2. Compare what Lincoln says here about slavery to the "present controversy":

"All these free blacks are the descendants of slaves, or have been slaves themselves, and they would be slaves now, but for something which has operated on their white owners, inducing them, at vast pecuniary sacrifices, to liberate them. What is this something? Is there any mistaking it? In all these cases it is your sense of justice, and human sympathy, continually telling you, that the poor

negro has some natural right to himself -- that those who deny it, and make mere merchandise of him, deserve kicking, contempt and death." Abraham Lincoln, Peoria Speech, 1854.

3. At Galesburg, the other day, I said, in answer to Judge Douglas, that three years ago there never had been a man, so far as I knew or believed, in the whole world, who had said that the Declaration of Independence did not include negroes in the term 'all men'. I reassert it today. I assert that Judge Douglas and all his friends may search the whole records of the country, and it will be a great matter of astonishment to men if they shall be able to find that one human being three years ago had every uttered the astounding sentiment that the term 'all men' in the Declaration did not include the negro. Do not let me be misunderstood. I know that more than three years ago there were men who, finding this assertion constantly in the way of their schemes to bring about the ascendancy and perpetuation of slavery, denied the truth of it. I know that Mr. Calhoun and all the politicians of his school denied the truth of the Declaration. I know that it ran along in the mouth of some Southern men for a period years, ending at last in that shameful, though rather forcible, declaration of Petit of Indiana, upon the floor of the United States Senate, that the Declaration of Independence was in that respect a 'self-evident lie', rather than a self-evident truth. But I say... that three years ago there never had lived a man who had ventured to assail it in the sneaking way of pretending to believe it, and then asserting it did not include the negro..." Lincoln, Lincoln's speech at Alton, during the Lincoln-Douglas debates.

4. Chief Justice Taney and Judge Stephen Douglas assert that the authors of the Declaration of Independence did not intend to include negroes. In this assertion, they do 'obvious violence to the plain, unmistakable language of the Declaration. I think the authors of that notable instrument intended too include all mean, but they did not intend to declare all men equal in all respects. They did not mean to say all were equal in color, size intellect, moral

developments, or social capacity. They defined with tolerable distinctness, in what respects they did consider all men created equal -- equal in 'certain inalienable rights, among which are life, liberty, and the pursuit of happiness.' This they said, and this they meant....They meant to set upa standard maxim for a free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere.' Lincoln, Speech of the Dread Scott decision, 1857.

5. 'Let us discard all this quibbling about this man the other man, this race and that race and the other race being inferior, and therefore must be placed in an inferior position. Let us discard all these things, until we shall once more stand up declaring that all men are created equal.' Lincoln, Chicago Speech, July 10, 1858.

6. "I trust I understand, and truly estimate the right of self-government. My faith in the proposition that each man should do precisely as he pleases with all which is exclusively his own, lies at the foundation of the sense of justice there is in me .... The doctrine of self-government is right -- absolutely and eternally right -- but it has no just application, as here attempted. Or perhaps I should rather say that whether it has such just application depends upon whether a negro is <u>not</u> or <u>is</u> a man. If he is <u>not</u> a man, why in that case, he who <u>is</u> a man may, as a matter of self-government, do just as he pleases with him. But if the negro <u>is</u> a man, is it not to that extend, a total destruction of self-government, to say that he too shall not govern <u>himself</u>? When the white man governs himself that is self-government; but when he governs himself, and also governs <u>another</u> man, that is <u>more</u> than self-government -- that is despotism. If the negro <u>is</u> a man, why then my ancient faith teaches me that 'all men are created equal'; and that there can be no moral right in connection with one man's making a slave of another." Lincoln, Speech on the Kansas-Nebraska Act, 1854.

7. 'It was impossible to raise the question of the status of the humanity of the Negro, without at the same time raising an equally vital question concerning the status of the humanity of white men. It was impossible to deny the Negro the natural rights demanded for all men by the Declaration of Independence without denying the natural foundation of the rights of white men. And it was impossible to change radically the way of conceiving of the white man's rights without changing radically the white man's life. Even if the legal foundation of American rights had remained the same -- which Lincoln believed impossible -- the changed conception of their extra-legal foundation in 'the laws of Nature and of Nature's God' would have been catastrophic to him. It would have been a change in the inner consciousness of the American citizen which would have sapped his moral dignity and have deprived him of his inner worth ...'

Harry V. Jaffa, Crisis of the House Divided: An Interpretation of the Issues in the Lincoln-Douglas Debates (Chicago: The University of Chicago Press, 1959), 303.

WW.

**List of Quotations from Founders of the United States and Framers of the Constitution which Evidence the Principle that the Right to Life As a Natural and Inalienable Right Is Beyond the Power of Government to Withhold from any Class of Human Beings.**

1. James Wilson

In this constitution (1789) all authority is derived from the people ... when a single government is instituted, the individuals of which it is composed surrender to it a part of their natural independence, which they before enjoyed as men. The Works of James Wilson, ed by James DeWitt Andrews, Callaghan & Co., Chicago (1896) Vol. I & II, James Wilson, Speech in Convention, November 16, 1987 p. 539, 545.

2. John Adams

Rights antecedent to all earthly government - Rights that cannot be repealed or restrained by human laws - Rights derived from the great Legislator of the universe. ... British liberties are not the grants of princes or parliaments, but original rights, conditions of original contracts ... coeval with government. ... Many of our rights are inherent and essential, agreed on as maxims, and established as preliminaries, even before a parliament existed. 3 Adams, Life and Works 448-64, at 449, 463.

3. John Adams

Whether we should recur to the law of nature, as well as to the British constitution, and our American charters and grants. Mr. Galloway and Mr. Duane were for excluding the law of nature. I was strenuous for retaining and insisting on it, as a recourse to which we might be driven by Parliament much sooner than we were aware. Adams,

Life and Works 374.

4. Alexander Hamilton

The sacred rights of mankind are not to be rummaged for, among old parchments, or musty records. They are written, as with a sun beam in the whole volume of human nature, by the hand of the divinity itself, and can never be erased or obscured by mortal power. Alexander Hamilton, "The Farmer Refuted." This can be found in Morton J. Frisch, ed., Selected Writings and Speeches of Alexander Hamilton (Washington: American Enterprise Institute for Public Policy Research, 1985), 21.

5. Alexander Hamilton

The law of nature [is] '... coeval with mankind, and dictated by God himself, [and] is, of course, superior in obligation to any other. It is binding over all the globe, in all countries, at all times. No human laws are of any validity, if contrary to this ...' Alexander Hamilton, ibid., 20. (quoting Blackstone's Commentaries)

6. Alexander Hamilton

In short, when human laws contradict or discountenance the means, which are necessary to preserve the essential rights of any society, they defeat the proper end of all laws, and so become null and void. Alexander Hamilton, ibid., 22.

7. John Dickinson

...[A] constitution is the organization of the contributed rights in society. Government is the exercise of them. It is intended for the benefit of the governed, of course [it] can have no just powers but what conduce to that end: and the awfulness of the trust is demonstrated in this -- that it is founded on the nature of man, that is, on the will of his Maker, and is therefore sacred. Fabius (John Dickinson of Pennsylvania), Letter IV.

8. Tench Coxe

This is a most enlightened time, but more especially so in regard to matters of government. The divine right of kings, the force of ecclesiastical obligations in civil affairs, and many other gross errors, under which our forefathers have lain in darker ages of the world, are now done away. The natural, indefeasible and unalienable rights of mankind form the more eligible ground on which we now stand ... On this solid basis is reared the fabric of our new federal government. These taken together form THE GREAT AND WHOLE OF THE AMERICAN CONSTITUTIONS, the fairest fabric of liberty that every blessed mankind, immovably founded on a solid rock, whose mighty base is laid at the center o the earth." Essay by a democratic Federalist (likely Tench Coxe), printed in the Philadelphia Independent Gazetteer, 26 November 1787.

9. James Madison

Let us recur 'to the great principle of self-preservation; to the transcendent law of nature and of nature's God, which declares that the safety and happiness of society are the objects at which all political institutions aim and to which all such institutions must be sacrificed.' James Madison, Federalist No. 43.

10. James Madison

Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe ... If 'all men are by nature equally free and independent,' all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights ... Either then, we must say, that the will of the legislature is the only measure of their [the people's] authority; and that in the plentitude of this authority, they may sweep away all our fundamental rights; or, that they are bound to leave ... [natural] right untouched and sacred ..." James Madison, "memorial and

Remonstrance," 1785. This can be located in Marvin Meyers, ed., The Mind of the Founder: Sources of the Political Thought of James Madison (Hanover: University press of New England, 973), 6-13.

11. Thomas Jefferson

'And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God? That they are not to be violated but with his wrath? Indeed I tremble for my country when I reflect that God is just; that His justice cannot sleep forever ...' Thomas Jefferson, Notes on Virginia, Query XVIII. In this passage Jefferson is speaking about the God-given, natural and inalienable rights of all human beings and referring specifically to the fact that one of these rights -- the right to liberty -- has been denied to some human beings, i.e., to "slaves."

Numerous commentaries express this view of the constitution framers' understanding of natural and inalienable rights.

1. The Declaration of Independence appeals to the "laws of nature and of nature's God "to justify the United States' break with Britain and to declare to a candid world the basis of the political order that will take its place. The purpose and limits of political life are determined by the rule of a higher law in the divine and natural order. It could be said that God and nature, in the founders' understanding, are man's supreme legislature. This natural standard of right, which transcends all human laws and constitutions, directs politics in two ways. First, it shows politics its proper end, namely the safety and happiness of the people. ... Law is called a rule, in order to distinguish it from a sudden, a transient, or a particular order: uniformity, permanency, stability, characterize a law. In this way James Wilson, who along with Hamilton and Madison was the most thoughtful of the Constitution's framers, distinguished a law from an ad hoc decision made regarding a particular case. ... The rule of law, in sum, is a

governmental practice designed to make as likely as possible the coincidence of the two requirements of just government: that it be by the consent of the people and that it secure the safety and happiness of society.

Saving the Revolution: The Federalist Papers and the American Family, Ed. by Charles R. Kesler, The Free Press, N.Y. (1987)

2. Yet the human nature that modern constitutions channel cannot be considered mere matter. Human beings are not a formless sea of humanity; they are not body but bodies, and each body has a form and an end that, though common to other bodies, distinguish it from other bodies: the self and its preservation. men are not unformed; the form is given by nature - in the state of nature, according to Locke. This form is arranged and managed in the constitution of civil society, but is not itself changed by the constitution maker. ... Civil constitutions exist to serve and protect the form and end that men have in the state of nature, the rights of *man*, not of citizens. America's Constitutional Soul, Harvey C. Mansfield, J.r, John Hopkins Univ. Press, Brittain (1991).

3. (a) There are, it is predicated, certain principles of right and justice which are entitled to prevail of their own intrinsic excellence, altogether regardless of the attitude of those who wield the physical resources of the community. Such principles were made by no human hands; indeed, if they did not antedate deity itself, they still so express its nature as to bind and control it. They are external to all Will as such and interpenetrate all Reason as such. They are eternal and immutable. In relation to such principles, human laws are, when entitled to obedience save as to matters indifferent, merely a record or transcript, and their enactment an act not of will or power but one of discovery and declaration. ...

(b) Thus the legality of the Constitution, its supremacy, and its claim to be worshipped, alike find common standing ground on the belief in a law superior to the will of human governors. ...

(c) That is to say the essential ingredient of the justice which is enforced by the state is not of the state's own contrivance; it is a discovery from nature and a transcript of its constancy. ...

(d) And the less casual evidence of everyday speech is to like effect: "the people of these United Colonies," "your whole people," "the people of America," "the liberties of American," "the rights of Americans," "American rights," "Americans." The constant recurrence of such phrases in contemporary documents bespeaks the conscious identity of Americans everywhere in possession of the rights of men. Natural rights were already on the way to become national rights. The Higher Law Background of American Constitutional Law, edward S. Corwin, Cornell Univ. Press, Ithica (1984), p. 4, 5 8, 80.